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No. 86-684-CSY  
Status: GRANTED

Title: California, Petitioner  
v.  
Billy Greenwood and Dyanne Van Houten

Docketed:  
October 20, 1986

Court: Court of Appeal of California,  
Fourth Appellate District

Counsel for petitioner: Pear, Michael J.

Counsel for respondent: Schwartzberg, Richard L.,  
Garey, Michael Ian

Entry	Date	Note	Proceedings and Orders
1	Oct 20 1986	G	Petition for writ of certiorari filed.
2	Nov 25 1986		DISTRIBUTED. December 12, 1986
3	Dec 8 1986	P	Response requested -- HAB, SOC. (Due January 7, 1987)
5	Dec 18 1986		Order extending time to file response to petition until February 1, 1987.
11	Jan 20 1987		Brief of respondent Dyanne Van Houten in opposition filed.
12	Jan 20 1987	N	Motion of respondents for leave to proceed in forma pauperis filed.
9	Feb 2 1987		Order extending time to file response to petition until February 6, 1987.
10	Feb 2 1987		The above extension applies to respondent Billy Greenwood.
13	Feb 11 1987		Brief of respondent Billy Greenwood in opposition filed.
14	Feb 11 1987	G	Motion of respondents for leave to proceed in forma pauperis filed.
15	Feb 18 1987		REDISTRIBUTED. March 6, 1987
16	Jun 19 1987		REDISTRIBUTED. June 25, 1987
17	Jun 26 1987		Motion of respondents for leave to proceed in forma pauperis GRANTED.
18	Jun 26 1987		Petition GRANTED. *****
19	Jul 13 1987	G	Motion of respondent Billy Greenwood for appointment of counsel filed.
20	Jul 14 1987		DISTIBUTED. Sept. 28, 1987. (Above motion for appointment of counsel).
21	Jul 31 1987		Joint appendix filed.
22	Jul 31 1987		Brief of petitioner California filed.
23	Aug 5 1987		Record filed.
24	Aug 6 1987	G	Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae filed.
25	Aug 10 1987		Brief amici curiae of California, et al. filed.
27	Aug 17 1987		Order extending time to file brief of respondent on the merits until September 15, 1987.
28	Sep 3 1987	D	Motion of respondent Van Houten for divided argument filed.
29	Sep 12 1987		Brief of respondent Dyanne Van Houten filed.
30	Sep 15 1987		Brief of respondent Billy Greenwood filed.
31	Sep 21 1987		Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae



Entry	Date	Note	Proceedings and Orders
32	Oct 5 1987		GRANTED. Motion of respondent Van Houten for divided argument DENIED.
33	Oct 5 1987		Motion for appointment of counsel GRANTED and it is ordered that Michael Ian Garey, Esquire, of Santa Ana, California, is appointed to serve as counsel for the respondent Billy Greenwood in this case.
34	Nov 20 1987		CIRCULATED.
35	Nov 23 1987		SET FOR ARGUMENT. Monday, January 11, 1988. (3rd case).
36	Dec 3 1987	X	Reply brief of petitioner California filed.
37	Jan 11 1988		ARGUED.

86-684

①

Supreme Court, U.S.  
FILED

OCT 20 1986

JOSEPH F. SPANIOL, JR.  
CLERK

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
October Term, 1986  
\_\_\_\_\_

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Petitioner,*

vs.

BILLY GREENWOOD AND  
DYANNE VAN HOUTEN,

*Respondents.*

\_\_\_\_\_  
**Petition for Writ of Certiorari to the Court of Appeal  
of California, Fourth Appellate District**  
\_\_\_\_\_

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MICHAEL R. CAPIZZI, Assistant District Attorney  
WILLIAM W. BEDSWORTH, Deputy-in-Charge  
Writs and Appeals Section

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2518



## **QUESTION PRESENTED**

**DO WARRANTLESS TRASH SEARCHES OF DISCARDED  
GARBAGE VIOLATE THE FOURTH AND FOURTEENTH  
AMENDMENTS?\***

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\* Certiorari has been granted by this Court on the same issue in *California v. Rooney*, 85-1835 on October 14, 1986.

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IN THE  
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October Term, 1986  
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THE PEOPLE OF THE STATE OF CALIFORNIA,

*Petitioner,*

vs.

BILLY GREENWOOD AND  
DYANNE VAN HOUTEN,

*Respondents.*

\_\_\_\_\_  
**Petition for Writ of Certiorari**  
\_\_\_\_\_

Petitioner, State of California respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, which held that warrantless trash searches of discarded garbage violate the Fourth Amendment and therefore affirmed the trial court's dismissal of felony drug charges against Respondents.

**OPINIONS BELOW**

The Opinion of the Court of Appeal (Appendix A) is published as *People v. Billy Greenwood, et al.*, (182 Cal.App.3d 729 (1986).

The order of the California Supreme Court denying Petition for Review is attached as Appendix B.



## **JURISDICTION**

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, was filed on June 23, 1986.

A timely Petition for Review was denied by the California Supreme Court on August 28, 1986.

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a Writ of Certiorari runs from the date of the refusal to review. [*American Railway Express v. Levee*, 263 U.S. 19, 20-21 (1923).]

This petition, filed within 60 days of that date, is timely. This Court's jurisdiction is invoked under 28 USCA section 1257(3).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."  
U.S. CONST. amend. IV.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend XIV, § 1.

### **STATEMENT OF THE CASE<sup>1/</sup>**

Respondents were charged in a felony complaint with possession of cocaine for sale. Greenwood was also charged with possession of marijuana for sale and possession of Psilocybin (C.T. 2).

Following a preliminary examination, the Respondents were held to answer in superior court. The magistrate denied Respondent's motion to quash search warrants. (C.T. 43).

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<sup>1</sup> The designation 'C.T.' refers to the Clerk's transcript. The designation 'R.T.' to the Reporter's Transcript.

A five-count information was filed in Superior Court charging Greenwood and Van Houten with possession of cocaine for sale and with possession of cocaine. Greenwood was also charged with possession of marijuana for sale and possession of Psilocybin (C.T. 253-254).

On February 1, 1985, the trial court granted Respondent's motion to set aside the information and dismissed the case (C.T. 261), on the basis that the Fourth Amendment prohibits warrantless trash searches (R.T. 22-23, 26).

The People appealed that ruling to the Court of Appeal, Fourth District, which affirmed based on the 1971 decision of the California Supreme Court in *People v. Krivda*, 5 Cal.3d 357, which held that warrantless trash searches violate the Fourth Amendment.

The California Supreme Court denied a Petition for Review.

### STATEMENT OF FACTS

The relevant facts are detailed in the Court of Appeal Opinion, therefore, only a few summarizing sentences are added.

Based on tips received by the Laguna Beach Police Department that Greenwood was involved in drug trafficking, investigators conducted warrantless trash searches of Greenwood's garbage on April 6, 1984, and on May 4, 1984. Each time trash collectors picked up the garbage from the street in front of the single family residence with a detached guest house and turned it over to the police (C.T. 100, 148).

Both times evidence of drug trafficking was uncovered which was used to obtain search warrants, each of which led to the seizure of drugs and the instant prosecution.

The affidavits in support of the search warrants detailed the trash collection (C.T. 296-319).

The superior court granted Respondent's motion to set aside the information.

While expressing dissatisfaction with *Krivda*, the court felt bound to follow it.

It's difficult when you find a case on the federal level that is much more well-reasoned than the California Supreme Court case involving *People v. Krivda*. And it's difficult for a trial court when you look at the rationality, in my opinion, of the *Krivda* decision (R.T. 26.)

I think I'm bound distastefully to grant your 995. . . . Quite frankly, I hope this is one time that the California Supreme Court overturns this trial court. (R.T. 27, 28.)

The Court of Appeal, in affirming, noted:

Despite holdings to the contrary in our federal courts, this court is bound by *Krivda* unless or until the United States Supreme Court addresses the same question or our own Supreme Court overrules *Krivda*. (182 Cal.App.3d at 735, App. A, pg. 14.)

### **HOW THE FEDERAL QUESTION IS PRESENTED**

Respondents argued (unsuccessfully) to the preliminary hearing magistrate that warrantless trash searches violate the Fourth Amendment (C.T. 15, 17, 20). Their motion to quash the search warrants was denied (C.T. 43).

Respondent's motion to set aside the information was based on the contention that such searches violate the Fourth Amendment (C.T. 290-293; R.T. 8, 16).

The trial court granted their motion (C.T. 261; R.T. 22-23, 26).

The Court of Appeal decision, affirming dismissal, rests solely on the Fourth Amendment grounds.

### **REASONS WHY THE WRIT SHOULD BE GRANTED**

The decision by the California Court of Appeal on this Fourth Amendment question is in conflict with decisions of every federal

court of appeals to decide the issue (i.e. Circuits 1-9, inclusive) and with decisions of virtually every other state court of last resort to consider the issue. [Rule 17.1(b).]

Further, the decision of the California Court of Appeal has decided an important and recurring question of federal law, which has not been, but should be, settled by this Court. [Rule 17.1(c).]

The California Court of Appeal found itself bound by the 1971 *Krivda* decision "unless or until the United States Supreme Court addresses the same question or our own Supreme Court overrules *Krivda*" (182 Cal.App.3d at 735).

The California Supreme Court declined Petitioner's invitation to correct its earlier error.

In *People v. Krivda* (1971) 5 Cal.3d 357, the California Supreme Court, in a four to three decision, held that a warrantless trash search violated defendant's reasonable expectation of privacy.

The United States Supreme Court granted certiorari, but being unable to determine whether *Krivda* had been decided on federal grounds, state grounds or both, this Court vacated and remanded for clarification. 409 U.S. 332/

The California Supreme Court, on remand, responded it had relied on both Federal and independent state grounds. [*People v. Krivda* (1973) 8 Cal.3d 623.]

But, as the California Court of Appeal noted, in the case at bar:

Subsequent to *Krivda* and prior to the offenses charged here, California enacted Proposition 8 (Cal.Const., art I, § 28, subd. (d)), and eliminated an accused's right to suppress evidence seized in violation of the California, but not the Federal, Constitution. (See *In re Lance W.* (1985) 37 Cal.3d 873) (App. A, pg. 13.)

Thus the independent state grounds that insulated *Krivda* from review by this Court 15 years ago is gone.

Petitioner submits that review of that 1971 Fourth Amendment determination is appropriate in view of its subsequent unanimous rejection by the federal courts of appeals.

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<sup>2</sup> Under existing practice, this Court might have reached the merits in *Krivda*. (See *Michigan v. Long* 463 U.S. 1032, 1040-1041.)

Every federal circuit court of appeals considering the issue has concluded that warrantless trash searches do not violate the Fourth Amendment. (*United States v. Mustone* (1st Cir. 1972) 469 F.2d 970; *United States v. Terry* (2nd Cir. 1981) 702 F.2d 299, cert.den. \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S.Ct. 2095; *United States v. Reicherter* (3rd Cir. 1981) 647 F.2d 397; *United States v. Crowell* (4th Cir. 1978) 586 F.2d 1020, cert.den. 440 U.S. 959; *United States v. Vahalik* (5th Cir. 1979) 606 F.2d 99 (cert.den. 606 U.S. 1081); *Magda v. Benson* (6th Cir. 1976) 536 F.2d 111; *United States v. Shelby* (7th Cir. 1978) 573 F.2d 971 (cert.den. 439 U.S. 841); *United States v. Biondick* (8th Cir. 1981) 652 F.2d 743 (cert.den. 454 U.S. 975); *United States v. Dela Espirella* (9th Cir. 1986) 781 F.2d 1432.

Most recently in *Dela Espirella*, *supra*, the Ninth Circuit ruled on a warrantless trash search case from California:

As a part of their investigation, federal agents searched trash containers placed for curbside collection outside Ronderos' home. The agents discovered various documents in the trash that were used to obtain a search warrant and were introduced into evidence at trial. Ronderos argues that the district court erred in not suppressing this evidence as obtained in violation of the fourth amendment.

We find this argument to be without merit. Warrantless searches of abandoned property do not violate the fourth amendment. The question, then, becomes whether placing garbage for collection constitutes abandonment of the property. We join the other federal appellate circuits that have considered the matter and hold that it does. (781 F.2d at 1437.)

In the *United States v. Shelby*, *supra*, the court held:

As we see the issue, it is whether or not the search of the trash constituted a violation of the defendant's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is defendant's position that he had a reasonable expectation of privacy in his



trash since he contemplated that it would be collected and disposed of by intermingling with other trash and eventually destroyed. Perhaps the defendant did in fact believe that the incriminating evidence of his crime so disposed of would go undetected. If defendant did, we view it only as additional bad judgment on his part. In the real world to so view the status of one's discarded trash is totally unrealistic, unreasonable, and in complete disregard of the mechanics of its disposal.

. . .

It therefore seems to be more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California.

The court found *Krivda* "is too unrealistic to be pursued." (573 F.2d at 974, cert.den. 439 U.S. 831.)

The majority of state courts considering the issue have likewise concluded that warrantless trash searches of garbage left out for collection are not violative of the Fourth Amendment. [see *People v. Huddleston* (1976) 38 Ill.App.3d 277, 347 N.E. 2d 76; *Smith v. State* (1973 Alaska) 510 P.2d 793; *State v. Fassler* (1972 Arizona) 503 P.2d 807; *Croker v. State* (1970 Wyoming) 477 P.2d 122; *State v. Purvis* (1968 Oregon) 438 P.2d 1002; *People v. Whotte* (1982 Michigan) 317 N.W.2d 266; *State v. Oquist* (1982 Minnesota) 327 N.W.2d 587; *State v. Brown* (1984 Ohio) 484 N.E.2d 215; *State v. Stevens* (1985 Wis.) 367 N.W. 2d 788; *State v. Schultz* (1980 Fla.) 388 So.2d 1326.]

*Krivda*'s holding that warrantless trash searches violate Federal law would, no doubt, surprise Federal officers all of whom, under the authorities cited, may lawfully make the searches *Krivda* says they can't.

*Krivda* requires re-examination! It is not a correct statement of Federal law.

Of *Krivda*, it may truly be said:

One may seriously and fairly question the strength of a juridical light that is discerned by so

few and invisible to so many. [*People v. Disbrow*  
(1976) 16 Cal.3d 101, dissenting opinion of Justice  
Richardson at 129.]

Wherefore, Petitioner respectfully requests this Honorable Court  
to grant certiorari.

Dated this

day of October, 1986.

Respectfully submitted,

CECIL HICKS, District Attorney  
County of Orange, State of  
California

MICHAEL R. CAPIZZI, Assis-  
tant District Attorney

WILLIAM W. BEDSWORTH,  
Deputy-In-Charge

Writs and Appeals Section

MICHAEL J. PEAR, Deputy  
District Attorney

Attorneys for Petitioner





**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION THREE**

**COURT OF APPEAL  
4th DIST.**

**FILED**

**JUN 23 1986**

**Keenan G. Casady, Clerk  
Deputy Clerk**

**THE PEOPLE OF THE  
STATE OF CALIFORNIA**  
*Plaintiff and Appellant,*

**v.**

**BILLY GREENWOOD et al.,**  
*Defendants and Respondents,*

**G002400**

**(Super. Ct. No. C-55040)**

**OPINION**

**APPEAL** from a judgment of the Superior Court of Orange County, David O. Carter, Judge. Affirmed.

Cecil Hicks, District Attorney, Michael R. Capizzi, Assistant District Attorney, William W. Bedsworth and Michael J. Pear, Deputy District Attorneys, for Plaintiff and Appellant.

Garey & Bonner and Michael Ian Garey for Defendant and Respondent Billy Greenwood.

Ronald Y. Butler, Public Defender, Frank Scanlon, Assistant Public Defender, Richard Aronson and Richard Schwartzberg, Deputy Public Defenders, for Defendant and Respondent Dyanne Van Houten.

In 1971 the California Supreme Court held that a warrantless search of trash barrels left for routine collection violated the Fourth Amendment. (*People v. Krivda* (1971) 5 Cal.3d 357.) The prosecution argues the *Krivda* holding is erroneous and directly contradicts the majority of our federal circuit courts and other state courts which have ruled on this question. We must determine whether *Krivda* is binding precedent.

Billy Greenwood and Dyanne Van Houten were charged with felony narcotics possession offenses after contraband was twice discovered in Greenwood's home during the execution of two different search warrants in 1984. Both warrant affidavits included incriminating information obtained from warrantless searches and seizures of trash Greenwood left for collection at the curb. While the preliminary hearing magistrate upheld each warrant, the superior court disagreed and granted Greenwood's and Van Houten's motion to set aside the information (Pen. Code, § 995), concluding their motion to suppress evidence (Pen. Code, § 1538.5) seized pursuant to the warrants should have been granted at the preliminary hearing. The prosecution appeals.

In early February 1984, a federal narcotics agent from the Drug Enforcement Administration (DEA) contacted Laguna Beach Police Investigator Jenny Stracner. The agent informed Stracner that a suspect in custody in Nevada had told him that a large U-Haul truck full of drugs was en route to 1575 Fayette Place, Laguna Beach. Greenwood lived at that address. The agent and Stracner searched for the truck, but were unable to find it.

Later in February, a neighbor of Greenwood's telephoned Stracner to complain about heavy vehicular traffic late at night and early in the morning in front of Greenwood's house. The caller said people in the cars went into Greenwood's house but usually only stayed a few minutes. She also told Stracner that a large U-Haul truck had been parked in front of the house for four days.

On February 14, 1984, Stracner conducted a surveillance of Greenwood's house between 11 p.m. and 2:30 a.m., observing four vehicles arrive and depart at separate times. The next day, Stracner and another officer watched again, from 11 p.m. to 2 a.m., observing four different vehicles arrive and depart at separate times. No vehicle stayed longer than ten minutes.

On February 23, 1984, the same neighbor told Stracner that a large Jartran truck was parked in front of Greenwood's house. Stracner contacted an investigator from the County Sheriff's department, who went to the location with a dog trained to detect narcotics. A canine sniff-search yielded negative results. Later the same day, Stracner and Investigator Jimenez followed the Jartran truck to a residence in Newport Beach, which Stracner learned had previously been under investigation as a narcotics trafficking location.

In February, Stracner began to monitor and search the trash set out for collection in front of Greenwood's house. On April 6, 1984, at 6 a.m., Stracner drove past the house and observed a man put some trash out in front. Stracner told the trash collector that she wanted the trash. The trash collector cleaned his truck bin of other refuse and collected Greenwood's trash. The collector then gave it to Stracner. When Stracner searched it, she found evidence of drug trafficking.

The same day, Stracner obtained a search warrant for Greenwood's home, described as a two-story house with a detached guesthouse. The affidavit in support of the warrant outlined the above facts, including the results of the warrantless trash can search, in detail.

That evening Stracner and other police officers executed the warrant. As the officers approached Greenwood's home, they could see Greenwood, Van Houten, and another woman inside through the glass front doors. The officers knocked, announced their purpose, and demanded entry. Greenwood ran upstairs and one of the women ran out of sight. After repeating the announcement and getting no response, the officers forced entry. A substantial quantity of cocaine was seized in the ensuing search and all three occupants were arrested. Each posted bail.

Subsequently, Stracner told Investigator Rahaeuser the details of the investigation and arrests. Thereafter, the same neighbor of Greenwood's who had spoken to Stracner communicated directly with Rahaeuser. On three separate occa-

sions between April 16 and May 3, the neighbor told Rahaeuser about continuing heavy late-night vehicle traffic at Greenwood's house. On May 3, yet another police officer, Officer Ishmael, was at Greenwood's house in response to an unrelated disturbance complaint. Ishmael spoke with a woman at the house who seemed very nervous. She only opened the door enough to step out, closing it behind her. While she spoke to Ishmael, several persons peeked out from behind curtains. Ishmael explained all this to Rahaeuser.

On May 4, Rahaeuser drove by Greenwood's house and observed a man put more trash out for collection. Rahaeuser took possession of Greenwood's trash from the official trash collector in the same manner as Stracner had done previously. Again, Greenwood's trash contained evidence of drug trafficking. On May 9, Rahaeuser obtained another search warrant for Greenwood's house. He executed it three days later, finding more drugs, and more evidence of drug trafficking. Greenwood was again arrested.

## I

Each warrant is dependent on the information from the two trash searches. In other words, if the fruits of the trash searches are excised from the warrant affidavits, those affidavits lack probable cause to search because there was no information supporting a reasonable conclusion narcotics would be found in Greenwood's house at that time. (*Raymond v. Superior Court* (1971) 19 Cal.App.3d 321, 327). Without the evidence of current trafficking found in the trash, the remaining information in the warrant affidavits was stale and fell short of establishing probable cause to search. (See *Sgro v. United States* (1932) 287 U.S. 206; *Alexander v. Superior Court* (1973) 9 Cal.3d 387; *Hemler v. Superior Court* (1975) 44 Cal.App.3d 430.)

## II

*People v. Krivda, supra*, 5 Cal.3d 357 held that warrantless trash searches are illegal because the owner maintains an expectation of privacy even though he has set the trash out for collection. Under *Krivda*, a trash can placed in front of an accused's house for collection is not abandoned property.

Thus, the court prohibited the "practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant." (*Id.* at p. 367).

Subsequent to *Krivda* and prior to the offenses charged here, California enacted Proposition 8 (Cal. Const., art. I, § 28, subd. (d)), and eliminated an accused's right to suppress evidence seized in violation of the California, but not the federal, Constitution. (See *In re Lance W.* (1985) 37 Cal.3d 873.) Thus, the first question is whether *Krivda* was based on the federal or state Constitution. This same question was posed to the *Krivda* court by the United States Supreme Court in response to a petition for writ of certiorari. On remand, the California Supreme Court expressly stated its holding invalidating warrantless trash searches was based on both the Fourth Amendment to the United States Constitution and article I, section 19, of the California Constitution. (*People v. Krivda* (1973) 8 Cal.3d 623, 624).

Under the doctrine of stare decisis, we are bound by the California Supreme Court's interpretation of the Fourth Amendment in *Krivda* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), unless the United States Supreme Court has decided the question differently. (*People v. Rooney* (1985) 175 Cal.App.3d 634, 644.) At oral argument, the prosecution agreed it had not and further agreed *Krivda* was binding on this court because of stare decisis. It urges *Krivda* needs reexamination, but concedes that reexamination must be undertaken by our state Supreme Court. It is not this court's place to question the pronouncements of our state Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

We are convinced neither the trial court nor this court may reexamine the rule in *Krivda* which declares warrantless trash searches illegal. Indeed, the only other published decision on this question reached the same result. (*People v. Rooney*, *supra*, 175, Cal.App.3d 634, 644.) And the petitions for review in that case were denied. While ordinarily our state Supreme



Court's denial of review "is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of [the Supreme Court] [citations]." It does not follow that such a denial is without significance as to [the Supreme Court's] views [citations]." (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 178; see also *McGlothlen v. Department of Motor Vehicles* (1977) 71 Cal.App.3d 1005, 1017; *Phillips v. Bartolomie* (1975) 46 Cal.App.3d 346, 351).

Despite holdings to the contrary in our federal courts, this court is bound by *Krivda* unless or until the United States Supreme Court addresses the same question or our own Supreme Court overrules *Krivda*. (*People v. Neer* (1986) 177 Cal.App.3d 991.) The warrantless trash searches here were illegal and the warrants based on them should have been quashed. (*Raymond v. Superior Court, supra*, 19 Cal.App.3d at p. 327.)

### III

The prosecution also challenges Van Houtens's standing to suppress evidence, because she did not make a showing establishing an expectation of privacy in Greenwood's trash. Preliminarily, we note Van Houten was only charged with possession offenses relating to narcotics found in her purse, which was in Greenwood's home. Undeniably, the record establishes her standing to challenge the search of her purse. (See *United States v. Salvucci* (1980) 448 U.S. 83.) That search was predicated on the warrant for Greenwood's house, where Van Houten probably also had an expectation of privacy due to her physical presence at the time the search warrant was executed. In any event, the expectation of privacy question relates to her purse. We would not require a separate showing of standing as to Greenwood's trash to challenge the purse search.

Moreover, had the prosecution raised the standing question during the evidentiary hearing in municipal court, Van Houten may well have established an expectation of privacy

in Greenwood's trash. The prosecution's failure to challenge her standing there constitutes a waiver of the issue here. (*Steagald v. United States* (1981) 451 U.S. 204, 208-209.)

In light of our required allegiance to *Krivda*, none of the other issues raised by the parties need be discussed. The motion to suppress evidence should have been granted at the preliminary hearing. The superior court judge correctly ruled that error required he set aside the information as to both Greenwood and Van Houten.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Wallin

Wallin, J.

WE CONCUR:

/s/ Trotter

Trotter, P.J.

/s/ Sonenshine

Sonenshine, J.

**ORDER DENYING REVIEW**  
**AFTER JUDGMENT BY THE COURT OF APPEAL**  
**4th District, Division 3, No. G002400**  
**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**  
**IN BANK**

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PEOPLE, Appellant,

SUPREME COURT

v.

**FILED**

BILLY GREENWOOD et al.,  
Respondents.

AUG 28 1986  
Laurence P. Gill, Clerk

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DEPUTY

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Appellant's Petition for review DENIED.  
Lucas, J. and Panelli, J., are of the opinion  
the petition should be granted.

---

BIRD  
Chief Justice



## PROOF OF SERVICE BY MAIL

I, Arthur E. Vanderveer, declare that I am a resident of the County of Orange, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 2136 South Wright Street, Santa Ana, California.

On the 24<sup>th</sup> day of October, 1986, I served within PETITION FOR WRIT OF CERTIORARI on the Respondents herein, by placing a true copy thereof enclosed in a sealed envelope, postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

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All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 1986  
at Santa Ana, California.

---

EDITOR'S NOTE

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**ORIGINAL**

Supreme Court, U.S.
JAN 20 1987
JOSEPH P. ...
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-684

(2)

---

The State of California,

Petitioner,

vs.

Billy Greenwood and Dyanne Van Houten,

Respondents.

---

On Writ of Certiorari to the  
Court of Appeal of California  
Fourth Appellate District, Division Three

---

**RESPONDENT'S BRIEF IN OPPOSITION**

---

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Counsel for Respondent  
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1388

QUESTIONS PRESENTED

1.

Did the People of the State of California preserve the issue of respondent Dyanne Van Houten's standing to challenge the search of Billy Greenwood's trash?

2.

Is this writ application distinguishable from that presently before the Court in California v. Rooney?

3.

Are there unresolved issues of fact and law which neither the trial court nor the court of appeal were required to address once each determined trash searches were violative of the Fourth amendment?

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1.

THE PEOPLE FAILED TO PRESERVE THE QUESTION OF  
RESPONDENT DYANNE VAN HOUTEN'S STANDING  
TO CHALLENGE THE SEARCH OF BILLY GREENWOOD'S  
TRASH.

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2.

PEOPLE v. ROONEY IS DISTINGUISHABLE

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3.

THERE ARE UNRESOLVED ISSUES OF FACT AND LAW  
WHICH NEITHER THE TRIAL COURT NOR THE COURT  
OF APPEAL WERE REQUIRED TO ADDRESS ONCE EACH  
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<u>People v. Krivda</u> (1973) 8 Cal. 3d 623 . . . . .	4
<u>People v. Rooney</u> (1985) 175 Cal. App. 3d 634 . . . . .	5, 6

Respondent, Dyanne Van Houten, respectfully requests this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Court of Appeal of California, Fourth District, Division Three in this matter, decided June 23, 1986. The opinion is reported at 182 Cal. App. 3d 729.

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**STATEMENT OF THE CASE**

Respondent adopts Petitioner's Statement of the Case. (See Petition for Writ of Certiorari, pp. 2-3.)

---

**STATEMENT OF FACTS<sup>1</sup>**

Jenny Stracner was a narcotics investigator for the city of Laguna Beach. (C.T. 129.) Based upon information received from an anonymous informant, she began a practice in February to monitor the trash at Billy Greenwood's residence. (C.T. 113.) She would ask the trash collectors to pick up the trash at Greenwood's residence, keep it separate from all other trash in the truck, and bring it down the street where she would wait. (C.T. 92.)

The trash was brought in a segregated area of the trash truck in a dark trash bag tied at the top. (C.T. 102.) There was no evidence any contraband could be seen without opening the bag. Inside the bags officer Stracner found items she believed indicated drug use; bindles with residue, straws with residue and baggies with residue. (C.T. 91.)

Based upon her findings, she sought and obtained a search warrant for 1575 Fayette, Laguna Beach. (See exhibit one below.) On April 6, 1984, she and other police officers executed the search warrant on the house. (C.T. 130.)

---

<sup>1</sup> The facts are those solely relevant to the proceedings against Dyanne Van Houten. Respondent adopts the facts set forth in the opinion of the court of appeal at 182 Cal. App. 3d 729.

During the search of respondent Greenwood's house, officer Richard Seapin went upstairs to search additional rooms. (C.T. 160.) On the floor he observed a purse. Officer Seapin opened the purse and looked inside seeing a sheet of magazine, crumpled up. (C.T. 161.) Seapin removed the paper from the purse, opened it and found white powder which he turned over to officer Stracner. (C.T. 161-162.)

The purse contained an identification card with Dyanne Van Houten's name and picture. (C.T. 163.) When officer Jimenez went downstairs with the purse and asked whose it was, Dyanne Van Houten claimed it. (C.T. 175.) Van Houten was then arrested. (C.T. 70.) The white powder was determined to be cocaine. (C.T. 61.)



## REASONS WHY THE PETITION SHOULD BE DENIED

1.

THE PEOPLE FAILED TO PRESERVE THE QUESTION OF  
RESPONDENT DYANNE VAN HOUTEN'S STANDING  
TO CHALLENGE THE SEARCH OF BILLY GREENWOOD'S  
TRASH.

In their Petition to this Court, the People have raised the simple and unencumbered question whether trash placed at curbside is protected under the Fourth Amendment. However, in the court of appeal the People further asserted Dyanne Van Houten lacked standing (United States v. Salvucci (1980) 448 U.S. 83) to challenge the warrant served on Greenwood's residence since she appeared to be "but a guest in the residence" at the time of the search. However, based upon the People's failure to raise the issue before both the magistrate and trial court, the court of appeal determined the,

"failure to challenge her standing [ ] constitute[d] a waiver of the issue here. (Steagald v. United States (1981) 451 U.S. 204, 208-209.)" (People v. Greenwood, (1986) 182 Cal. App. 3d 729, 735.)

Thus, were the Court to grant review and endeavor to decide the issue as presented in the Petition, the People have burdened that decision with the procedural error of failing to object to the hearing on the basis of the proposed lack of standing. In short, for the Court to reverse the decision of the court of appeal, the Court must itself determine an issue of constitutional proportions (see gen. Steagald v. United States, supra) never raised in the Petition for Writ of Certiorari and never raised before a trier of fact in the trial courts.

Further, should the Court reverse the decision of the court of appeal, respondent Van Houten must still be afforded an opportunity to challenge the search of Greenwood's residence and the search of her purse conducted pursuant to the warrant. Both would be challenged on the basis that the search warrant lacked probable cause even with the evidence

collected from Greenwood's trash and the search of respondent's purse pursuant to the warrant exceeded the scope of the warrant issued by the magistrate. Neither issue was explored below solely due to the clear California precedent mandating suppression of warrantless trash searches.

Based upon the necessity of following People v. Krivda (1971) 5 Cal. 3d 357 and People v. Krivda (1973) 8 Cal. 3d 623 (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450), neither the magistrate nor the trial court were required to resolve whether independent of any privacy interest in the trash Dyanne Van Houten's Fourth Amendment protection was violated by the search of her purse. As the court of appeal determined,

"[e]ach warrant [was] dependent on the information from the two trash searches. In other words, of the fruits of the trash searches are excised from the warrant affidavits, those affidavits lack[ed] probable cause to search . . . ." (People v. Greenwood, supra, at p. 733.)

Similarly, based upon Krivda, never were either respondents Greenwood or Van Houten required to establish, as a matter of fact rather than law, that they had a reasonable expectation of privacy in the trash placed at curbside. (Katz v. United States (1967) 389 U.S. 347.) All arguments made by the People and respondents were predicated on the decision of the California Supreme Court in Krivda that as a matter of law trash was protected regardless of the objective or subjective reasonableness of the owner. The result is that a decision by this Court reversing the decision of the court of appeal will not result in a final decision on whether the search of respondent Van Houten's purse was proper.

PEOPLE v. ROONEY IS DISTINGUISHABLE

People v. Rooney (1985) 175 Cal. App. 3d 634 [cert. granted California v. Rooney (85-1835)] represents a factual setting far different than that presented here. Rooney was a confirmatory search of a communal trash bin where the police lacked probable cause to search the bin but were possessed with sufficient probable cause (id., at pp. 646-647) to seek a warrant prior to the search of Rooney's house. While the Court may well have granted certiorari to resolve the efficacy of warrantless trash searches in its broadest sense, the facts in Rooney do not permit the Court to resolve whether probable cause, or some lesser standard, must exist for a warrantless search of trash bins. The court of appeal specifically resolved the search warrant in the People's favor and reversed the dismissal below. (Id., at p. 649.)

When the police searched Billy Greenwood's trash, they did so absent any legally sufficient quantum of cause. Without corroboration (Illinois v. Gates (1983) 462 U.S. 213), the police here searched Greenwood's trash solely upon an anonymous tip and nothing more. Similarly, unlike Rooney, the search warrant obtained for Greenwood's residence was based solely upon the trash searches conducted without probable cause and were held invalid by the court of appeal.

The greatest difficulty in resolving the reasonableness of trash searches is the ultimate decision whether trash left at curbside of a residence is abandoned property or whether, as the court of appeal opined in Rooney, should trash left in such condition receive a,

"secondary level of protection applicable to automobiles in determining Fourth Amendment search and seizure issues[?]" (People v. Rooney, supra, at p. 645.)

Since California determined in Krivda that as a matter of law trash left at curbside was enveloped in the same protections afforded the home, the facts underlying any conclusion to the

contrary were never developed below and thus the Court is without a factual background over which a judgment on the lawfulness of this search may be gauged.

In sum, Rooney and this proceeding share only the nature of the container which police chose to attack in building a case. Beyond the garbage pail, little is in common.

THERE ARE UNRESOLVED ISSUES OF FACT AND LAW  
WHICH NEITHER THE TRIAL COURT NOR THE COURT  
OF APPEAL WERE REQUIRED TO ADDRESS ONCE EACH  
DETERMINED TRASH SEARCHES WERE PER SE VIOLATIVE  
OF THE FOURTH AMENDMENT.

Petitioner seeks a decision that trash left at curbside is not subject to the protections of the Fourth Amendment. In support of that position Petitioner notes that most courts which have confronted the issue have reached that conclusion. Presumably Petitioner will argue that trash, no matter where left, is abandoned property.

However, for this Court to make such a determination the record should not be so narrowly confined as to leave the Court no basis upon which to judge the appropriateness of that conclusion. The state of the record before the Court in this proceeding is bereft of any facts other than those which arise from police conduct; a search of trash leading to a search warrant for a residence.

No where was it established whether respondents' harbored a subjective expectation of privacy. This is the state of the record notwithstanding evidence the trash was in an opaque, closed trash bag which required the police to either tear through or untie to gain entry and observe its contents. No magistrate or trial judge, sitting as a trier of fact, has ever determined the veracity of a claim of privacy nor has a trier of fact, based upon the facts of this case, determined if an expectation of privacy was reasonable.

If the Court is to engage in a policy debate pitting a citizen's right to privacy<sup>2</sup> against the State's right to prosecute criminal activity, that debate should begin in the lower courts. Here there has been neither debate nor

---

<sup>2</sup> Since this brief is not addressed to the merits it may be inappropriate to raise the question of to what degree the State should be permitted to on the one hand demand citizens give their garbage to the State, primarily in the form of local ordinances restricting the transportation, possession and storage of trash, and at the same time declare open season on surveillance of its contents for public examination and criminal prosecution.

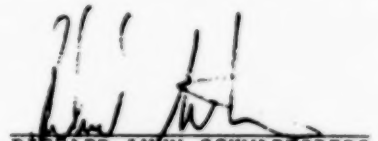
reflection. It was not until Petitioner reached the California Supreme Court that such debate began and it is inappropriate to take that debate up now. Whether the Court should hold trash left at curbside is abandoned, whether it is to be treated akin to possessions left in an automobile upon the highway, or whether it is to be afforded the same protections citizens enjoy in their homes and curtilage, this case is not ripe to make those determinations.

**CONCLUSION**

For these reasons, the Petition for a Writ of Certiorari should be denied.

DATED: January 20, 1987

Respectfully submitted,



RICHARD LYNN SCHWARTZBERG  
Attorney for Respondent  
Dyanne Van Houten

CALIFORNIA,

v.

BILLY GREENWOOD et.al.

DECLARATION OF SERVICE

STATE OF CALIFORNIA

COUNTY OF ORANGE

SS

Richard Schwartzberg declares that he is a citizen of the United States, a resident of Orange County, over the age of eighteen years, not a party to the above-entitled action and has a business address at 401 Civic Center Drive West, Santa Ana, California 92701.

That on the 20th day of January, 1987, I served a copy of the BRIEF IN OPPOSITION in the above-entitled action by depositing a copy thereof in a sealed envelop, postage thereon fully paid, in the United States mail at Santa Ana, California. Said envelopes were addressed as follows:

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Santa Ana, California 92701

XX CA. SUPREME COURT  
3580 Wilshire Blvd.  
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Los Angeles, California 90010

Further, that on the same date I personally served a copy of the above-entitled action by delivering by hand and leaving with the person hereinafter named a copy thereof:

XX CECIL HICKS, DISTRICT ATTORNEY  
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RICHARD SCHWARTZBERG

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Supreme Court, U.S.  
**FILED**  
**FEB 11 1987**  
JOSEPH P. CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-684

THE STATE OF CALIFORNIA,

Petitioner,

v.

BILL GREENWOOD and DYANNE VAN HOUTEN,

Respondents.

On Writ of Certiorari to the  
Court of Appeal of California  
Fourth Appellate District, Division Three

RESPONDENT'S BRIEF IN OPPOSITION

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1.

QUESTIONS PRESENTED

1.

IS A FEDERAL QUESTION SQUARELY PRESENTED.

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1.

A FEDERAL QUESTION IS NOT SQUARELY PRESENTED.

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Respondent, Bill Greendwood, respectfully requests this Court deny the Petition for Certiorari, seeking review of the decision of the Court of Appeal of California, Fourth Appellate District, Division Three in this matter, decided June 23, 1986. The opinion is reported at 182 Cal.App.3d 729.

---

**STATEMENT OF THE CASE**

Respondent Greenwood adopts Petitioner's Statement of the Case. (See Petition for Writ of Certiorari, pp. 2-3.)

---

**STATEMENT OF FACTS**

Respondent Greenwood adopts the facts contained in the Opinion of the Court of Appeals.

## REASONS WHY THE PETITION SHOULD BE DENIED.

1.

### A FEDERAL QUESTION IS NOT SQUARELY PRESENTED.

The question of whether or not a warrantless search of trash receptacles left at curbside for collection mandates suppression of evidence under the Fourth Amendment would appear to turn on the question of whether or not the citizen has a reasonable expectation of privacy in the contents. As will be noted, infra, in the peculiar text herein involved, that issue must itself be determined almost wholly as a matter of state law.

The exclusionary rule of the Fourth Amendment is held to apply in those instances wherein there has been a violation of a constitutionally protected reasonable expectation of privacy. As this Court recently observed in Oliver v. United States (1984) 466 U.S. 170, 177-178 [80 L.Ed.2d 214, 223, 104 S.Ct. 1735]:

This interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Since Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), the touchstone of Amendment analysis has been the question whether a person has a "constitutionally protected reasonable expectation of privacy." Id., at 360, 19 L.Ed.2d 576, 88 S.Ct. 507 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.'" Id., at 361, 19 L.Ed.2d 576, 88 S.Ct. 507. See also Smith v. Maryland, 442 U.S. 735, 740-741, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979).

\* \* \*

No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. See Rakas v. Illinois, 439 U.S. 128, 152-153, 58 L.Ed.2d 387, 99 S.Ct. 421.

(1978) (Powell, J., concurring).

There is substantial precedent that in determining the validity of an arrest or search, Fourth Amendment analysis requires reference to state law.

Thus, although in part commanded by act of Congress, this Court noted in the case of U.S. v. Di Re, 332 U.S. 581, 589 [68 S.Ct. 222, 226, 92 L.Ed. 210 (1948)]:

We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeably to the usual mode of process against offenders in such state." There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.

(In accord, Miller v. United States 357 U.S. 310, 305, 2 L.Ed.2d 1332, 1336 78 S.Ct. 1190 (1958); U.S. v. Watson, 423 U.S. 411, 420 fn. 8, 46 L.Ed.2d 598, 607, 96 S.Ct. 820.)

Federal circuit decisions do not appear unanimous on this issue, and its resolution would appear to depend largely on the particular context involved. As noted in U.S. v. McNulty 729 F.2d 1243, 1251 (10th Cir. 1983):

We do not say that federal courts need never construe or apply state law. Where the circumstances dictate the propriety of applying state law, it will be recognized. An example of this United States v. Dudek, 530 F.2d at 690. The failure of Ohio police officers to file a timely report and a verified inventory was held (in Dudek) to not require violation of an otherwise validly executed search warrant issued under Ohio law. A dearth of federal law on the issue in question is one such constraint. United States v. Di Re, 332 U.S. 581, 589-91, 68 S.Ct. 222, 226-27, 92 L.Ed. 210 (1948). In that case, the Court ruled that state law governed the propriety of seizure of evidence of a federal crime by a state officer working with a federal officer, because there was insufficient federal law on the question of warrantless arrest. More to the point here, a relevant federal statute may prescribe reference to state law in certain instances. Cf. Fed.R.Evid. 501 (privilege in certain actions to be determined in accordance with state law). Thus a careful examination of Title III, the federal wiretap statute, is necessary here. (Fn. omitted.)

(See also, U.S. v. Mitchell, 783 F.2d. 971, 973-974, (10th Cir. 1983) holding Federal Law controlling; cf. Mason v. United States 719 F.2d 1485, (10th Cir 1983) referring to state law; U.S. v. Rickos 737 F.2d 360 (3rd Cir. 1984).)



And in a series of cases dealing with wiretap evidence some courts have relied on state law, since the issue involved the basic right of privacy, particularly when state officers act pursuant to a state warrant. As stated in U.S. v. Manfredi, 488 F.2d 586, 596 (2nd Cir. 1973):

In dealing with the question of the validity of the warrants themselves, clearly a question of law, it will be recalled that the Crodelle affidavit submitted to the state court judge in support of the petition seeking the wiretap order contained an agreement "to limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations." (Fn. omitted.)

But this doctrine concededly is not without its limitations. As stated in U.S. v. Jarabek, 726 F.2d 889, 900 (1st Cir. 1984):

**Curreri** involved a state investigation with the use of wiretap equipment authorized by a state court order. Federal officials became involved only after the wiretapping was completed. The analysis in this case, upon which appellants rely, must be read in the context of the court's observation that a stricter state statute regarding wiretap interception will be applied by a federal court only in the event electronic surveillance is conducted pursuant to a state court authorization. **Curreri** provides no support for appellant's claim.

We have found no federal case that has relied on state law in judging the admissibility of evidence of intercepted communications in any circumstances other than where the electronic surveillance was conducted pursuant to a state warrant or order. On the other hand, a number of cases stand for the proposition that in federal criminal trials, regardless of any violation of state law, the admissibility of wiretap evidence always is a question of federal law. E.g., **United States v. Butera**, 677 F.2d 1376, 1380 (11th Cir. 1982), **cert. denied**, U.S. (1983); **United States v. Horton**, 601 F.2d 319 323 (7th Cir.) **cert. denied**, 444 U.S. 937 (1979); **United States v. Melligan**, 573 F.2d 251, 253 (5th Cir. 1978); **United States v. Shafer**, 520 F.2d 1369, 1371-72 (3d Cir. 1975) (per curiam), **cert. denied**, 423 U.S. 1051 (1976). In the instant case it is not necessary for us to rest our decision upon this proposition, for here we have federal officers who performed their duties in a lawful manner in a joint investigation. The mere involvement of state officers is not sufficient reason to look to state law to determine the admissibility of interception evidence. (fn. omitted.)

The foregoing decisions provide ample analogous authority for reference to state law to determine certain basic issues of privacy.

And the warrantless trash searches involved in the present case what

is at first blush a general Fourth Amendment issue, but ultimately it is an issue which must rest on state law.

In People v. Krivda (1971) 5 Cal.3d 357, the California Supreme Court ruled that warrantless trash searches violate a reasonable expectation of privacy. In People v. Krivda (1973) 8 Cal.3d 623, 624, that Court ruled that its decision was based on both state and federal principles. California is not entirely alone on this issue, see, State v. Tanaka (Haw. 1985) 701 P.2d 1274, 1276; see also, Bolen v. State (Tenn. 1976) 544 S.W.2d 918, 920.)

More importantly, for purposes of the present analysis, a state citizen's reasonable expectation of privacy must be largely influenced by the peculiar facets of state law. State law is thus a circumstance which, viewed with other circumstances, determines the extent of privacy which a citizen might reasonably expect.

California has its own constitutionally protected right to be free from unreasonable searches and seizures (Cal. Const. Art I §13), and its own constitutional provisions protecting its citizens' right to privacy. (Cal. Const. Art I §1.)

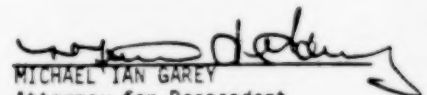
The adoption of Article I, §28(d) which eliminates the remedy of exclusion, does not by its terms alter these basic notions of privacy. (In re Lance W. (1985) 37 Cal.3d 873, 884.)

A citizen in California, thus has the right to expect that his privacy will not be invaded by violations of the state constitution, even though that constitution no longer provides a remedy of exclusion in a criminal proceeding. That expectation of privacy is reasonable, since it is embodied in the state constitution, and its

#### CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

  
MICHAEL IAN GAREY  
Attorney for Respondent  
Billy Greenwood

THE STATE OF

v.

BILLY GREENWO

---

STATE OF CALI

COUNTY OF ORA

I, ROSANA HUI  
California.  
action: my b  
Suite, 4th Fl

On February 1  
**BRIEF IN OPPO**  
copy thereof  
United States  
addressed as

Attorney Gene  
110 West "A"  
San Diego, CA

Court of Appe  
Fourth Appell  
600 West Sant  
Santa Ana, CA.

Further, that  
-entitled act  
hereinafter n

Cecil Hicks,  
700 Civic Cen  
Santa Ana, CA

I declare und  
correct.

Executed on F

CALIFORNIA,  
Petitioner,  
  
et al.,  
  
Respondents

DECLARATION OF SERVICE

CALIFORNIA )  
              ) ss  
E )

I, am employed in the county of Orange, State of California, am over the age of 18 and not a party to the within action. My business address is 611 Civic Center Drive West, Penthouse 1, Santa Ana, California 92701.

In 1987, I served the foregoing document described as COMPLAINT, in the above entitled action by depositing a copy in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were as follows:

1111 Street, #600 92101	Richard Schwartzberg 401 Civic Center Drive West #820 Santa Ana, CA. 92701
-------------------------------	--

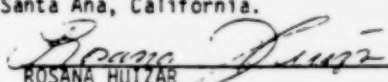
U.S. District Court Santa Ana Blvd. 92701	California Supreme Court 3580 Wilshire Blvd., Room 213 Los Angeles, CA. 90010
--	---

On the same date I personally served a copy of the above complaint by delivering by hand and leaving with the person named a copy thereof:

U.S. District Attorney 401 Civic Center Drive West 92701	Michael J. Pear, D.D.A. 700 Civic Center Drive West Santa Ana, CA. 92701
--	--

I declare under penalty of perjury that the foregoing is true and correct.

Witness my hand and seal this February 10, 1987, at Santa Ana, California.

  
ROSANA HUIZAR

No. 86-684

Supreme Court, U.S.  
FILED

JUL 31 1987

JOSEPH E. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1987

CALIFORNIA,

*Petitioner,*

v.

BILLY GREENWOOD AND  
DYANNE VAN HOUTEN,

*Respondents.*

ON WRIT OF CERTIORARI TO  
THE COURT OF APPEAL OF THE STATE  
OF CALIFORNIA, FOURTH APPELLATE DISTRICT

JOINT APPENDIX

CECIL HICKS, DISTRICT  
ATTORNEY, COUNTY OF  
ORANGE, STATE OF  
CALIFORNIA

MICHAEL R. CAPIZZI,  
ASSISTANT DISTRICT  
ATTORNEY

BRENT ROMNEY, DEPUTY  
IN CHARGE WRITS AND  
APPEALS SECTION

MICHAEL J. PEAR,  
DEPUTY DISTRICT ATTORNEY

P.O. BOX 808  
SANTA ANA, CA 92702  
TELEPHONE: (714) 834-3600

*Counsel for Petitioner*

RICHARD SCHWARTZBERG  
ATTORNEY AT LAW  
401 CIVIC CENTER  
DRIVE WEST  
SANTA ANA, CA 92701

MICHAEL GAREY  
ATTORNEY AT LAW  
611 CIVIC CENTER  
DRIVE WEST  
SANTA ANA, CA 92701

*Counsel for Respondents*

**PETITION FOR CERTIORARI FILED  
OCTOBER 20, 1986  
CERTIORARI GRANTED JUNE 26, 1987**



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The following Opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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## CHRONOLOGY

1984

Oct. 2, 3 & 4 Motion to Quash Search Warrants and Preliminary Examination conducted before Magistrate in Municipal Court, South Orange County Judicial District. Magistrate Denies Motion to Quash and Holds Respondents Greenwood and Van Houten to Answer in Superior Court.

Oct. 15 Information is filed in Superior Court, Respondents are arraigned and enter not guilty pleas.

Nov. 15 Notice of Motion and Motion to Set Aside Information Pursuant to Penal Code Section 995 filed by Respondents.

1985

Jan. 22 Points and Authorities in Opposition to Motion to Set Aside Information filed by Petitioner.

Jan. 25 Hearing on Motion to Set Aside Information begins.

Feb. 1 Hearing on Motion to Set Aside Information concludes. Superior Court grants Respondents' Motion to Set Aside Information, Orders case dismissed and defendants discharged.

Feb. 4 Notice of Appeal filed by Petitioner in the Superior Court.

1986

June 23 Opinion of the Court of Appeal, State of California, Fourth Appellate District is filed which affirms the dismissal by the trial court.

Aug. 28 Petitioner's Petition for Review is denied by the California Supreme Court.

Oct. 20 Petition for writ of Certiorari is filed in the United States Supreme Court.

1987

June 26 Certiorari is granted.

IN THE MUNICIPAL COURT,  
SOUTH ORANGE COUNTY JUDICIAL DISTRICT

Portion of Clerk's Transcripts of Motion to  
Quash Search Warrants and of Preliminary  
Hearing:

(BY MR. GAREY FOR GREENWOOD)

So I think the situation that is facing this Court is that the California Supreme Court has decided that by federal standard, by Fourth Amendment standard, a trash can search is illegal, there is no other controlling authority that I know of to which this Court can or should look.

Accordingly, this Court should ~~conclude~~ that the portions of the affidavit in support of the search warrant in this case, both of them, that are the product of trash can searches should be not considered in the sense of probable cause, the balance of the warrant—the affidavit is not sufficient to support the warrant and I think in that sense it would have to be quashed, both of them. (CT 17:4-16)

MR. GAREY: Proposition 8 can't affect the California Supreme Court's view of the Fourth Amendment because the Fourth Amendment carries with it an exclusionary rule which couldn't be touched by Proposition 8. The only question we're talking about is the interpretation of the Fourth Amendment. (CT 28:4-9)

MR. GAREY: But the California Supreme Court has said by federal standards that is illegal. There is no other court that has the power to change that other than the United States Supreme Court, or, as I said, if the Cali-

ifornia Supreme Court wants to re-examine its own rule, that's fine.

The People's argument here is addressed very, very, much to the wrong court. This Court under the cases that I cited having to do with court procedure, in essence, and the Auto Equity Sales case, and the other cases that I cited to this Court, this Court really doesn't have the power to disagree with Krivda on the question of what does the Fourth Amendment mean and put in that context Proposition 8 becomes utterly irrelevant.

I'm not arguing Article 1 Section 13. I don't have to. (CT 28:19-29:7)

(BY THE COURT)

. . . the question is: How is the Court now to determine whether or not as a matter of federal law a trash can search is illegal? (CT 38:5-6)

THE COURT: If I had no case law to go on but only common sense it would be one of the easier decisions I have ever made in my life and that would be that there is no reasonable expectation of privacy when you put your trash out. I think it's hard for me to understand how anybody could rule otherwise, but other people have ruled otherwise including our Supreme Court in Krivda. (CT 38:17-23)

But I will consider anything, but if left to my own devices, I certainly would be embarrassed to have to argue in front of anybody but lawyers, you know, just the average person out there on the street who would rely on common sense, I would certainly be embarrassed to stand up and argue and say oh, yeah, you have a great

expectation of privacy, in your, you know, in your trash there dumped out, people are going through it all the time. You have got the trash pickers up at the dump and crash (sic) collectors are always looking for something good in there. Some lawyers with the thinking that we have developed I suppose you can argue anything and it won't sound ridiculous, but, boy to two million non-lawyers out there, you would get a great skit on Johnny Carson. (39:7-19)

MR. NOVEMBER: (for Van Houten) Your Honor, just to reaffirm what Mr. Garey said, it's not a trash matter that we're concerned about, it's really the law enforcement people. It's not your neighbor, if it was neighbors here or just a curious trash man, we wouldn't be here arguing this motion before this court. (41:22-42:1)

THE COURT: Nice try there. Okay. Well, I will deny the motion to quash. (43:21-22)

BY MR. GAREY: Q. Officer Stracner, on April the 6th when you contacted the trash collector, what did you do? Did you make some kind of a request to the trash collector?

A. Yes, I did.

Q. What request was that?

A. To pick up the trash at 1575 Fayette.

Q. And what did you ask him to do with the trash?

A. To deliver it to me.

Q. And did he do that?

A. Yes, he did.

Q. Did you thereafter go through the trash?

A. Yes, I did. (91:12-23)

Q. By the way, in order to get to 1575 Fayette Place by automobile, do you have to travel on a private road?

A. No.

Q. It's all what? City-owned or County-owned roads?

A. City.

Q. Did you see where the trash collector people picked up the trash cans?

A. Yes, I did.

Q. Where was that?

A. On the street.

Q. Directly in front of the 1575 address?

A. Yes. (100:5-17)

BY MR. NOVEMBER: Q. And the morning you contacted this man was he alone, or was there someone working with him?

A. He was alone.

Q. And you saw him pick up the trash and garbage from 1575 Fayette Place?

A. Yes.

Q. And then subsequent to him doing that the containers of trash and garbage were delivered to you?

A. Yes.

Q. And that had been pursuant to your request?

A. Yes.

Q. And when you received them from the garbage man, in what type of receptacles or containers was the trash?

A. Plastic garbage bags.

Q. Are they a dark color?

A. Most of them are dark, yes. (101:16-102:5)

BY MR. GAREY: Q. Mr. Rahaeuser, sometime during the month of May of 1984 did you participate in a surveillance of 1575 Fayette Place in Laguna Beach?

A. During what month, sir?

Q. May.

A. Yes, sir.

Q. And in that connection, sometime during the month of May did you contact the trash collector for that area?

A. Yes, sir; I did.

Q. On what date was that?

A. May I refer to my report, sir?

Q. Sure.

A. It was on May the 4th, sir.

Q. About what time of day or night was that?

A. It was between seven and nine o'clock, I believe, sir.

Q. In the morning?

A. Yes.



Q. What did you say to the trash collector?

A. I advised him who I was, and I told him that I was conducting an investigation; and I asked if he would assist me.

Q. And did you tell him what kind of assistance you wanted?

A. Yes, sir.

Q. What kind of assistance did you tell him that you wanted?

A. I told him there was some trash up the street that I was desirous to have and that there were certain procedures that would have to be followed in order for me to obtain the trash.

Q. What procedure did you tell him that would have to be followed?

A. I told him his collection bin would have to be free from any trash. He would then have to, after he left, to go directly to that house, pick up the refuse that was located in front of the house, put it in his bin and come back to my location.

Q. And to the best of your knowledge did he follow your instructions?

A. Yes, sir.

Q. And did he then provide you with the trash?

A. Yes, sir.

Q. In what form was the trash when you got it?

A. I think on that particular day there were four different container trash bags; and I was only able to remove one of them from the actual bin.

Q. What happened to the other three?

A. They were inadvertently pushed in with all the rest of the refuse.

Q. On the one that you got, where did you take that?

A. Back to the Laguna Beach Police Department.

Q. Did you then go through the trash that was in the receptacle?

A. Yes, sir. (147:15-149:18)

---

Minutes of October 4, 1984

IN THE MUNICIPAL COURT  
OF SOUTH ORANGE COUNTY JUDICIAL DISTRICT  
COUNTY OF ORANGE, STATE OF CALIFORNIA

The People	)	(
of the State of California,)	)	(Billy E. Greenwood
)	)	(Dyonne Van Houten
) vs.	)	(Cathy Lee Allegar
)	)	(
Plaintiff,)	(	Defendants

Defendant(s) Billy Greenwood, Dyonne Van Houten, Cathy Allegar present and in court with counsel Mike Garey, B. November, DPD, Max DeLiema.

It appearing to me from the examination that the public offense(s) in the within complaint mentioned FELONY, to wit: 11351 H&S, 11350 H&S, 11359 H&S, 11377(a) H&S, has been committed, and that there is sufficient cause to believe the within named defendant(s) Billy Greenwood, Dyonne Van Houten guilty thereof, the motion of the deputy district attorney William Feccia that the defendant(s) be held to answer to count(s) # I, II, III, IV & V is granted for defendant(s) Greenwood & Van Houten ordered held to answer to the same, and further ordered to appear in Dept. # 43 of the Superior Court at 9:00 a.m. on October 15, 1984

Date: October 4, 1984      Blair Barnett,      Judge  
of the South Orange County  
Judicial District

---

Filed in open Superior Court of the State of  
California, in and for the County of  
Orange, on motion of the District  
Attorney of said Orange County, this  
15th day of October, 1984  
LEE A. BRANCH, COUNTY CLERK

By: /s/ Diane L. McHugh  
Deputy

IN THE SUPERIOR COURT  
OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF	)	
THE STATE OF CALIFORNIA,	)	
	)	
	)	Plaintiff,
	)	Case No. C-55040
	)	
vs.	)	
	)	INFORMATION
BILLY E. GREENWOOD	)	
DYANNE	)	
CHERYL VAN HOUTEN	)	
	)	
Defendant(s)	)	
	)	

COUNT I: The District Attorney of the County of Orange, by this Information, hereby accuses BILLY E. GREENWOOD and DYANNE CHERYL VAN HOUTEN of a Felony, to-wit: Violation of Section 11351 of the Health and Safety Code of the State of California (POSSESSION FOR SALE OF NARCOTIC), in that on or about April 6, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession for sale a controlled substance, to-wit: Cocaine.

COUNT II: And the said BILLY E. GREENWOOD and DYANNE CHERYL VAN HOUTEN is/are hereby

accused by the District Attorney of the County of Orange, by this second count of this Information, of a Felony, to-wit: Violation of Section 11350 of the Health and Safety Code of the State of California (POSSESSION OF NARCOTIC), in that on or about April 6, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession a controlled substance to-wit: Cocaine.

COUNT III: And the said BILLY E. GREENWOOD is/are hereby accused by the District Attorney of the County of Orange, by this third count of this Information, of a Felony, to-wit: Violation of Section 11359 of the Health and Safety Code of the State of California (POSSESSION OF MARIJUANA FOR SALE), in that on or about April 6, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession for purpose of sale marijuana.

COUNT IV: And the said BILLY E. GREENWOOD is/are hereby accused by the District Attorney of the County of Orange, by this fourth count of this Information, of a Felony, to-wit: Violation of Section 11377(a) of the Health and Safety Code of the State of California (POSSESSION OF DANGEROUS DRUG), in that on or about April 6, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession a controlled substance, to-wit: Psilocybin.

COUNT V: And the said BILLY E. GREENWOOD is/are hereby accused by the District Attorney of the County of Orange, by this fifth count of this Information, of a Felony, to-wit: Violation of Section 11359 of the Health and Safety Code of the State of California (POSSESSION OF MARIJUANA FOR SALE), in that on or about May 12, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession for purpose of sale marijuana.

Contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California.

DATED: October 15, 1984

CECIL HICKS,  
DISTRICT ATTORNEY,  
COUNTY OF ORANGE,  
STATE OF CALIFORNIA

By: /s/ Jill Roberts  
Deputy District Attorney

---

Superior Court Minutes  
of October 15, 1984

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE

JUDGE: David D. Carter

REPORTER: Linda Morgan      DATE: 10-15-84

CLERK: Diane L. McHugh      BALIFF: Steve Scott

TIME: 9:00 a.m.      D-43

C-55040      People vs. Van Houten, Dyanne Cheryl

HEARING RE: Arraignment

(X) At 11:30 a.m. DFDT IN CT WITH CSL MARGARET  
ANDERSON, DEP. P.D.

(X) INFO PRESENTED TO DFDT AND ORD FILED

(X) DFDT WAIVED ADVISEMENT OF HIS LEGAL  
AND CONSTITUTIONAL RIGHTS, DFDT AR-  
RAIGNED

(X) DFDT WAIVED READING OF INFOR

(X) TO INFO DFDT NOW PLEADS NOT GUILTY  
TO EACH CT

(X) Dfdt denied alleged prior convictions/use/armed al-  
legations as set forth in the (amended) info/indt

(X) CASE SET FOR TRIAL ON DECEMBER 3, 1984  
AT 9:00 a.m. IN DEPT. 43

(X) PRETRIAL SET FOR November 30, 1984 AT 8:00  
a.m. IN DEPT. 43

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE

JUDGE: David D. Carter

REPORTER: Linda Morgan      DATE: 10-15-84

CLERK: Diane L. McHugh      BAILIFF: Steve Scott

TIME: 9:00 a.m.      D-43

C-55040      People vs. Greenwood, Billy

HEARING RE: Arraignment

(X) DFDT IN CT WITH CSL MIKE GAREY

(X) PEOPLE REP BY JILL ROBERTS

(X) INFO PRESENTED TO DFDT AND ORD FILED

(X) DFDT WAIVED ADVISEMENT OF HIS LEGAL  
AND CONSTITUTIONAL RIGHTS, DFDT AR-  
RAIGNED

(X) DFDT WAIVED READING OF INFOR

(X) TO INFO DFDT NOW PLEADS NOT GUILTY  
TO EACH CT

(X) CASE SET FOR TRIAL ON DECEMBER 3, 1984  
AT 9:00 a.m. IN DEPT. 43

(X) PRETRIAL AND MOTIONS SET FOR NOVEM-  
BER 30, 1984 AT 8:00 a.m. IN DEPT. 43

---



Law Offices Of  
**GAREY & BONNER**  
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 3300 Irvine Avenue, Suite 300  
 Newport Beach, California 92660  
 (714) 852-8266

Attorneys for Defendant Greenwood

**SUPERIOR COURT OF THE  
 STATE OF CALIFORNIA FOR  
 THE COUNTY OF ORANGE**

The People Of The State )	Case Number C-55040
Of California, )	
	) Notice Of Motion And Mo-
Plaintiff, )	tion to Set Aside Informa-
	) tion Pursuant To Penal
vs. )	Code § 995.
	) Date: November 30, 1984
Bill Greenwood, et al., )	Time: 9:00 a.m.
	) Dept: 43
Defendants. )	Time Estimate: 1/2 Hour
_____ )	
	(Filed February 1, 1985)

**TO CECIL HICKS, DISTRICT ATTORNEY FOR  
 THE COUNTY OF ORANGE, AND TO THE CLERK  
 OF THE ABOVE ENTITLED COURT:**

PLEASE TAKE NOTICE that on November 30, 1984,  
 at 9:00 a.m., in Department 43 of the above entitled Court,  
 Defendant GREENWOOD will and does hereby move the  
 court for an order setting aside all counts of the Infor-  
 mation.

This motion is made on the grounds that:

1. The defendant was committed without reasonable  
 or probable cause; and

2. The defendant was not legally committed by a magistrate.

This motion will be submitted on the transcripts of the preliminary hearing, the court's file, the pleadings, the points and authorities to be submitted, and upon the arguments of counsel.

Dated November 15, 1984.

Respectfully submitted,

GAREY & BONNER

By /s/ Michael Ian Garey  
Attorney for Defendant Greenwood

---

Law Offices Of  
**GAREY & BONNER**  
 A Professional Corporation  
 3300 Irvine Avenue, Suite 300  
 Newport Beach, California 92660  
 (714) 641-2061

Attorneys for Defendant Greenwood

**SUPERIOR COURT OF THE STATE OF  
 CALIFORNIA FOR THE COUNTY OF ORANGE**

The People Of The State )	Case Number C-55040
Of California, )	
	) Points And Authorities In
Plaintiff, )	Support Of Motion To Set
	) Aside Information Pursuant
vs. )	To Penal Code § 995.
	)
Bill Greenwood, et al., )	Date: November 30, 1984
	) Time: 9:00 a.m.
Defendants. )	Dept: 43
	)
_____ )	(Filed February 1, 1985)

**STATEMENT OF FACTS**

A preliminary hearing and motion to suppress in this matter were heard on October 2nd, 3rd, and 4th, 1984, before the Hon. Blair Barnette, Judge presiding. The following is a summary of those proceedings as herein relevant.

At the outset of the proceedings, the court heard motions to quash the two search warrants,<sup>[1]</sup> on the grounds

---

[1] See, Exhibits "A" and "B".

that on their face, the warrants were based on unlawful controlled trash collections. The motions were denied. (PT I:[<sup>2</sup>] 5-37, 37)

Officer Jenny Stracner, of the Laguna Beach Police Department testified that on April 6, 1984, she executed a search warrant on 1575 Fayette Place in Laguna Beach. (PT I: 42-43) As she and other officers approached the french doors to the residence, she could observe the interior. She saw Defendant Greenwood, Van Houten, and Alleger. (PT I: 44) Greenwood was standing on the staircase, Alleger was in the upstairs bedroom near the balcony, and Van Houten (apparently after the entry) was in the downstairs bedroom. (PT I: 45) The officers knocked and announced their purpose and demanded entry, after which Greenwood ran upstairs, and Alleger ran out of sight. (PT I: 46-49) After repeating the announcement, and receiving no response at the door, one of the officers kicked the door open. (PT I: 49) Stracner searched the upstairs bedroom, bathroom, and closet. In the bathroom, standing in the shower, she located Greenwood, who then came out of the shower stall, fully clothed. (PT I: 49-51) In a small trash can next to the toilet, Stracner located a baggie of cocaine. (PT I: 52-53) Laboratory analysis confirmed that this item contained 13.85 grams of cocaine. On an upstairs balcony, Stracner also found a paper bundle containing 2.2 grams of cocaine. (PT I: 55-56) On a bed in the upstairs bedroom she located a yellow writing tablet with white powder residue. There was a straw laying on the bed with white powder residue. On the floor in

---

[2] Refers to transcript of October 2, 1984.

the bedroom was a purse, later identified as belonging to Van Houten, in which Stracner found a bindle containing 1.12 grams of cocaine. (PT I: 56-57) Also on the bed were a sifter and grinder. (PT I: 58)

Stracner also searched the garage, and found a bag of psilocybin mushrooms, and a 436-gram brick of hashish. (PT I: 59-60)

Stracner placed Defendant Greenwood under arrest, and found a straw and a bindle containing what appeared to be cocaine in his shirt pocket. (PT I: 64-65)

In a Captain's table downstairs she found a Bank of America Bank book, and Greenwood's passport.

Stracner's opinion was that the cocaine found in the bathroom was for personal use. She opined that the hash was possessed for sale. (PT I: 71-72)

Also searched was a guest house on the premises, which showed signs of being occupied. (PT I: 7) In the information from the informant, the guest house was not distinguished from the main house. (PT II: 11)

On Friday, April 6, 1984, Stracner, having previously decided to do so, conducted a warrantless controlled pick up of the trash at 1575 Fayette Place. (PT I: 73-79) She thereafter searched through the rubbish, and found items indicative of drug use. (PT II: 3-5)[<sup>2</sup>] The information that was gleaned from the trash search was then recited in the affidavit in support of the search warrant. (PT II: 5) Stracner had occasion to examine the trash from 1575

---

[2] (sic) Refers to transcript of October 3, 1984.

Fayette on numerous occasions from February to April of 1984, and maintained surveillance on the residence during that period. (PT II: 24-25)

Investigator Robert Rahaeuser of the Laguna Beach Police Department testified that he executed (a second) search warrant at 1575 Fayette Place on May 12, 1984. (PT II: 47) After knocking and announcing themselves, the executing officers forced entry. (PT II: 49-50) Once inside, the officer encountered Defendant Greenwood, who was part of the way down the stair case (in the main house). (PT II: 51) Rahaeuser discovered 2.2 grams of hashish in the kitchen. He also found a pound of marijuana in the garage. Fifteen hundred dollars in cash were also located as well as some personal papers. (PT II: 52-54) It was Rahaeuser's opinion that the contraband was possessed for sale, as well as that located in the April search. (PT II: 57-59) Investigator Stracner testified that the cocaine located in Van Houten's purse was possessed for sale. (PT II: 107-111)

Rahaeuser further explained that he conducted surveillance on 1575 Fayette Place during the month of May, 1984. On May 4th, he arranged for and conducted a controlled trash pickup and search of the trash from 1575 Fayette Place. (PT II: 59-61) In the trash, he located five short tubes, empty paper bindles, and a clear bag with marijuana fragments. This had not been the first time he searched the trash from 1575 Fayette Place; he had done so in the month of April; he had not attempted to obtain a search warrant to seize and examine the trash on May 4th. (PT II: 63)

Rahaeuser participated in a (second) search of the residence on May 12, 1984. After the second knock and

announcement, Rahaeuser did hear a male voice saying something, though Rahaeuser could not determine what it was. He thought someone was saying "hold on" or I'm coming," or "just a minute."

Defendant's motions to suppress were denied, and he was held to answer. (See, PT III:26)

## POINTS, AUTHORITIES AND ARGUMENT

### I

#### THE SEARCH WARRANTS FOR 1575 FAYETTE WAS INVALID.

While this case involves two separate search warrants, the issues relating to each may be discussed together, since each bears the same defect. For each warrant contains a probable cause showing that is based on an unlawful warrantless search of the trash cans at 1575 Fayette. In each case, the remaining evidence in the warrants are not even arguably sufficient to support the warrants' issuance.

It has been held that evidence which is itself the product of an illegal search or seizure may not be used to support the issuance of a search warrant. (*Raymond v. Superior Court* [1971] 19 Cal.App.3d 321, 327; *People v. Superior Court [Sosa]* [1982] 31 Cal.3d 883.)

In the present case, the warrants were based on warrantless searches of trash containers. Such searches have been held unlawful by the California Supreme Court under both the State and Federal Constitutions. (*People v. Krivda* [1971] 5 Cal.3d 357; *People v. Krivda* [1973] 8 Cal.3d 623).

In *People v. Krivda, supra*, 5 Cal.3d 357, the California Supreme Court ruled on facts identical to those in the



present case, that the controlled pick-up and search of a suspect's trash was unlawful. In so holding, the court relied heavily on the United States Supreme Court decision in *Katz v. United States*, 347, 350-352 [88 S.Ct. 507, 19 L.Ed.2d 576], and utilized the standard enunciated in *Katz*, which focuses on whether or not the suspect has exhibited a reasonable expectation of privacy and whether or not that expectation has been violated by unreasonable government intrusion. The Supreme Court in *Krivda* also relied upon its own prior decision in *People v. Edwards* (1971) 71 Cal.2d 1096, 1104, in which a trash can search was held unlawful. The court in *Edwards* has relied largely on Federal decisions. In concluding, the court found that the search violated *both* State and Federal Standards of reasonableness. The court therein stated, *Id.*, 71 Cal.2d:

It is also clear that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. The United States Supreme Court repeatedly "has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes [citation], and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (*Katz v. United States*, *supra*, 389 U.S. 347, 357, 88 S.Ct. 507, 514.) In the instant case it does not appear that any of the exceptions apply to the search of the trash can. Accordingly, that search was unlawful under the Fourth Amendment of the federal Constitution. It similarly violated article I, section 19, of the California Constitution. The trial court thus erred in admitting the evidence found in the trash can.



Subsequently, the United States Supreme Court on certiorari, remanded the case to the California Supreme Court, because the remanding Supreme Court could not determine whether *People v. Krivda*, *supra*, 5 Cal.3d 357, had been decided on Federal or State grounds. In so ruling, the United States Supreme Court expressed no view on whether or not such trash searches were unlawful. *California v. Krivda* (1972) 409 U.S. 33, 35 [93 S.Ct. 32; 34 L.Ed. 2d 45, 46].

The California Supreme Court responded to the mandate, clearly, and unambiguously ruling that its original decision in *Krivda* was decided on *both State and Federal* grounds. In so holding, the court stated, *People v. Krivda* (1973) 8 Cal.3d 613,

Pursuant to the mandate hereinabove quoted we have reexamined our opinion in the subject case (reported at 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262) and certify that we relied upon both the Fourth Amendment to the United States Constitution and article I, section 19, of the California Constitution, and that accordingly the latter provision furnished in independent ground to support the result we reached in that opinion. Inasmuch as we deem it unnecessary to alter or amend our prior decision, we reiterate that decision in its entirety.

While it is true that there are some Federal Circuit Court decisions holding that such trash searches are proper, (see, e.g., *U.S. v. Terry* [2nd Cir. 1983] 702 F.2d 299), such decisions are not binding on any California Court. The rule in this regard is well stated in the case of *People v. Willard* (1965) 238 Cal.App.2d 292, 305:

Finally, we bear in mind that while we are bound by decisions of the United States Supreme Court interpreting the federal Constitution (U.S. Const., art.

VI, § 2; *Mackenzie v. Hare* (1913) 165 Cal. 776, 779, 134 P. 713, L.R.A. 1916, 127, affirmed 239 U.S. 299; *Moon v. Martin* (1921) 185 Cal. 361, 366, 197 P. 77; *Perkins Mfg. Co. v. Jordan* (1927) 200 Cal. 667, 678-679, 254 P. 551; *Turkington v. Municipal Court* (1948) 85 Cal.App. 2d 631, 650, 193 P.2d 795) we are not bound by the decisions of lower federal courts even on federal questions although they are persuasive and entitled to great weight. (*Stock v. Plunkett* (1919) 181 Cal. 193, 194-195, 183 P. 657.)

(In accord, *People v. Cummings* [1975] 43 Cal. App.3d 1008.)

This court and all California courts are, however, clearly bound by the decisions of the California Supreme Court. As stated in the case of *Triggs v. Superior Court* (1973) 8 Cal. 3d 884, 890-891:

Our statements of law remain binding on the trial and appellate courts of this state (*People v. McGuire*, 45 Cal. 56, 57-58; *Latham v. Santa Clara County Hospital*, 104 Cal.App.2d 336, 340, 231 P.2d 513; *Globe Indemnity Co. v. Larkin*, 62 Cal.App.2d 891, 894, 145 P.2d 633.)

Accordingly, since the California Supreme Court has ruled that trash searches violate *both* the State and Federal Constitutions, this court is bound by that holding, and must follow it. This court, it is respectfully submitted, has no authority to do other than quash the warrant in the present case.

## II

THE WARRANT FOR 1575 FAYETTE PLACE WAS  
INVALID BECAUSE PROBABLE CAUSE WAS NOT  
ESTABLISHED AS TO EACH DWELLING UNIT.

The testimony at the combined preliminary hearing and motion to suppress established that two separate oc-

cupied living units existed on the premises at 1575 Fayette.[<sup>3</sup>] However, the affidavits in support of the two search warrants do not relate any of the probable cause showing to either of the living units. Under such circumstances, it is respectfully submitted that the warrant should have been, and should be, declared void. As stated in the case of *People v. Sheehan* (1972) 28 Cal.App.3d 21, 24:

Under the foregoing circumstances it is unnecessary to consider the propriety of the entries under which the information for the affidavit for the search warrant was obtained. (See, however, Pen.Code, § 855; and note *People v. Coulon* (1969) 273 Cal.App.2d 148, 155, fn. 8, 78 Cal.Rptr. 95.) There was nothing in the affidavit which would authorize the issuance of a warrant for the search of the habitation occupied by the defendant. In *People v. Estrada* (1965) 234 Cal.App. 2d 136, 44 Cal.Rptr. 165, this court noted, “. . . when a warrant directs (sic) a search of a multiple occupancy apartment house or building, absent a showing of probable cause for searching each unit or for believing that the entire building is a single living unit, the warrant is void and a conviction obtained on evidence seized under it cannot stand. [Citations.]” (234 Cal. App.2d at p. 146, but cf. generally pp. 144-49, 44 Cal. Rptr. at p. 172; and *People v. Fitzwater* (1968) 260 Cal.App.2d 478, 485-488, 67 Cal.Rptr. 190.)

Nor can the fact that the officers in this case were simply unaware of which dwelling unit related to their probable cause showing, offer the People any solace. The court in *Sheehan*, went on to state, *Id.*, 28 Cal.App.3d at 26:

The foregoing distinction is rather tenuous when viewed in the light of the fact that the defendant

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[3] One unit is referred to as the “guest house” and the other as the “main house.”

Coulon and his companion were camped 300 yards upstream from the nearest campsite and in a place from which no other inhabited place could be seen. (*Id.*, p. 152, 78 Cal.Rptr. 95.) The views expressed in the dissenting opinion in *Coulon* are more convincing. Ignorance should not substitute for the necessity of particularly describing the place to be searched, and of showing probable cause to believe that there is contraband at that place. The principle recognized in *People v. Estrada*, supra, against searching several living units upon a showing of probable cause to search one, applies to the facts revealed in this case.

And other cases on this point are analytically in accord, see e.g.: *People v. Cook* (1978) 22 Cal.3d 67, 97; *People v. Joubert* (1981) 118 Cal.App.3d 637, 650-651; *People v. Joubert* (1983) 140 Cal.App.3d 946, 950-951.

In the present case, the officers knew, prior to each search that there was a separate guest house in the premises. The probable cause showing did not distinguish between the two. The warrant should be held void.

### CONCLUSION

In view of the foregoing, it is respectfully submitted that this motion should be granted. No evidence, other than that which was the product of an unlawful search and seizure, was adduced to support the order holding Defendant Greenwood to answer.

Dated November 19, 1984.

Respectfully submitted,

GAREY & BONNER

/s/ By Richard W. Bonner for MIG  
Michael Ian Garey  
Attorneys for Defendant Greenwood

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ATTESTED: 9-21-84

Certified to be a true copy of the original on file in my office James B. Harris, Clerk, Municipal Court,  
South Orange County Judicial District, Orange County,  
California

By C. Spence  
Deputy

(Filed May 17, 1984)

IN THE MUNICIPAL COURT OF SOUTH  
JUDICIAL DISTRICT COUNTY OF ORANGE,  
STATE OF CALIFORNIA

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA:

TO: ANY SHERIFF, CONSTABLE, MARSHAL,  
POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE,  
STATE OF CALIFORNIA:

Proof, by affidavit, having been made this day before me by Investigator Robert RAHAEUSER that there is probable and reasonable cause for the issuance of the Search Warrant in accordance with Subdivision(s) 2, 3 & 4 of the Penal Code, Section 1524.

YOU ARE THEREFORE COMMANDED between the hours of 7:00 am and 10:00 pm good cause being shown therefor, to make search of the premises located at and described as:

1575 Fayette Place, Laguna Beach, County of Orange, California. Further described as a two story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the

two story structure. The numbers 1575, black in color, are affixed to the attached garage door. The residence to be searched is situated on the westside of Fayette Place and is the first structure south of the intersection of Panorama Drive and Fayette Place.

and the vehicle(s) described as: N/A

and the person(s) of: N/A

for the following personal property, to-wit: Cocaine, packaging materials for cocaine such as paper bindles, plastic baggies, glass vials, paraphernalia for cutting cocaine, such as razor blades, playing cards, mirrors and straws used to inhale cocaine, cutting agents for cocaine such as lactose, manitol, milksugar and procaine; scales and documents of personal property consisting of utility receipts, rent receipts, cancelled mail envelopes and telephone bills. Currency and documents tending to show narcotic transactions including pay and owe sheets, phone numbers and addresses of other individuals involved in narcotic transactions. Also the ability to monitor incoming phone calls during the execution of the search warrant.

and if you find the same or any part thereof, to bring it forthwith before me at the Municipal Court of South Judicial District for the County of Orange, or to any other court in which the offense(s) in respect to which the property or things taken is triable, or retain such property in your custody, subject to the order of the Court pursuant to Section 1536 of the Penal Code.

Given under my hand this 9 day of May, 1984.

/s/ Pamela Iles  
Judge of the Municipal Court

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ATTESTED: 9-21-84

Certified to be a true copy of the original on file in my office James B. Harris, Clerk, Municipal Court,

South Orange County Judicial District, Orange County,  
California

By C. Spence  
Deputy

(Filed May 9, 1984)

SW 0605

IN THE MUNICIPAL COURT South  
JUDICIAL DISTRICT COUNTY OF ORANGE,  
STATE OF CALIFORNIA

STATE OF CALIFORNIA

) ss

COUNTY OF ORANGE

AFFIDAVIT IN SUPPORT  
OF SEARCH WARRANT

Personally appeared before me this 9th day of May 1984, Inv. Robert RAHAEUSER, who, on oath, makes complaint, and deposes and says:

That he has, and there is just, probable and reasonable cause to believe, and that he does believe that there is now on the premises located at 1575 Fayette Place, Laguna Beach, County of Orange California. Further described as a two story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door. The residence to be searched is situated on the westside of Fayette Place and is the first structure south of the intersection of Panorama Drive and Fayette Place.

and on the person(s) of: N/A

the following personal property, to-wit: Cocaine, packaging materials for cocaine such as paper bindles, plastic baggies, glass vials, paraphernalia for cutting cocaine, such as razor blades, playing cards, mirrors and straws used to inhale cocaine, cutting agents for cocaine such as lactose, manitol, milksugar and procaine; scales and documents of personal property consisting of utility receipts, rent receipts, cancelled mail envelopes and telephone bills. Currency and documents tending to show narcotic transactions including pay and owe sheets, phone numbers and addresses of other individuals involved in narcotic transactions. Also the ability to monitor incoming phone calls during the execution of the search warrant.

Your affiant says that there is probable and reasonable cause to believe and that he does believe that the said property constitutes:

(See P.C. § 1524) property and things used as a means of committing a felony and are in the possession of persons with the intent to use it with the means of committing a public offense and consists of evidence which tends to show a felony has been committed and that the suspect has committed a felony.

Your affiant says that the facts in support of the issuance of the Search Warrant are as follows: that your affiant is a sworn police officer and has been so employed for four (4) years;

That your affiant, while acting in said capacity, has received the following information: On April 11, 1984 at approximately 0900 hours Your Affiant spoke with Investigator STRACNER, Laguna Beach Police Department, regarding a search warrant that was executed on April 6,



1984 at 1575 Fayette Place, Laguna Beach. Investigator STRACNER informed Your Affiant of all the facts collected during that investigation and subsequently related in her affidavit in support of search warrant which was signed by the Honorable Pamela ILES, Judge of the South Orange County Municipal Court, on April 6, 1984. Your Affiant also viewed all items of contraband which were seized at the Fayette Place location and was informed of the four subjects who were arrested upon culmination of that investigation. Refer to the attached certified copies of Investigator STRACNER's search warrant, affidavit in support of search warrant and return of search warrant labelled exhibits 1, 2 and 3. Your Affiant states that between April 16, 1984 and May 3, 1984 he had contact with a citizen informant on three separate occasions who reported an increase in vehicular traffic at 1575 Fayette Place, Laguna Beach. The informant advised Your Affiant that numerous vehicles have been seen arriving and departing from 1575 Fayette Place in the early morning hours, 0200 to 0400 hours. The informant told Your Affiant that the occupants of these vehicles would enter the Fayette Place location and depart from same a short time later, only staying at this location for approximately ten to fifteen minutes. Your Affiant was last contacted by the informant on May 3, 1984 at which time he/she reiterated the amount of traffic which was still occurring at 1575 Fayette Place. It should be noted this is the same citizen informant who supplied Investigator STRACNER with information which she incorporated in her affidavit in support of search warrant. The informant's residence is situated in such a manner that all vehicular/pedestrian traffic occurring at 1575 Fayette is clearly viewed. The informant told Your Affiant that his/her sole motive for re-

contacting Laguna Beach Police Department after the April 6th arrests was that the "same unusual activity" was again taking place at the Fayette Place location. On May 3, 1984 at approximately 0900 hours Officer ISHMAEL contacted Your Affiant at Laguna Beach Police Department to report an incident which occurred at 1575 Fayette Place earlier that morning. Officer ISHMAEL advised Your Affiant he was dispatched to 1575 Fayette Place at approximately 0400 hours reference a disturbance call. Upon arrival Officer ISHMAEL saw four vehicles parked in front of that location. Officer ISHMAEL recorded these license plate numbers and later gave them to Your Affiant. Your Affiant checked with Department of Motor Vehicles regarding the registered owners of these vehicles and discovered none were registered at 1575 Fayette Place. Officer ISHMAEL also advised Your Affiant that when he contacted a female occupant of that residence reference the disturbance complaint, she appeared extremely nervous to view his presence. Officer ISHMAEL related to Your Affiant that this female subject only opened the front door a very small distance and then immediately exited the residence closing the front door behind herself. While Officer ISHMAEL was conversing with this female subject outside the residence he viewed two of three subjects peeping through curtains inside the residence. On May 4, 1984 Your Affiant observed a white male adult, 6'0, 175 pounds with black hair open the garage door at the listed location, and put three trash containers outside on the public street to be picked up. Your Affiant then contacted the trash collector and advised him that Your Affiant wanted to collect the trash at that residence. Your Affiant told the collector that the trash container in which the trash was to be emptied into must be

clean of any other refuge. Your Affiant then observed the collector pick up the refuge at 1575 Fayette. The collector then gave this refuse to Your Affiant. It should be noted the male subject who Your Affiant viewed place the trash outside the Fayette location, walked up and down the street as if surveilling the immediate area prior to the collector's arrival and maintained a constant view on his trash while the collector preformed his duties. Your Affiant then returned to the Laguna Beach Police Department and began searching the refuge for contraband. During this procedure Your Affiant discovered five two inch plastic straws, one prefolded paper bindle and a plastic zip lock baggie containing a very small amount of a green leafy substance. This same refuge also contained addressed mail to 1575 Fayette Place and a dry cleaning bill addressed to GREENWOOD. Your Affiant has personal knowledge that Billy GREENWOOD was arrested at 1575 Fayette Place for narcotic related offenses on April 6, 1984. Due to an error in the collector's method of obtaining the refuge only one of three trash bags were collected. On May 4, 1984 Your Affiant gave the listed plastic straws containing a white powder residue to Forensic Specialist GILLIAM, an employee for Laguna Beach Police Department, to be tested. GILLIAM conducted a presumptive test on the residue found in each straw and found it to test positive for cocaine. GILLIAM has conducted over sixty presumptive tests for controlled substances, twenty-six of the tests were for cocaine. GILLIAM has a Bachelor of Arts degree with a minor in science and has 120 hours in chemical analysis. Refer to GILLIAM's evidence examination report, labelled as Exhibit number 4. It should be noted that GILLIAM has not testified in court concerning presumptive testion (sic). It is Your Affiant's belief based on the infor-

mation supplied by Investigator STRACNER coupled with the information supplied by the informant in addition to the contraband that was collected from the trash at 1575 Fayette Place, that the occupants of that residence are continuing to possess controlled substances for sale and personal use. It is your Affiant's personal knowledge that subjects who sell controlled substances tend to keep in their residence a supply of cocaine along with paraphernalia used in packaging and sales of controlled substances including paper bindles, plastic baggies, scales and currency to show excessive narcotic transactions. It is also Your Affiant's opinion that there is at the premise to be searched quantities of cocaine. Your Affiant has been a police officer for the past four years and has worked narcotic enforcement for the past three years. Your Affiant has spent over 250 hours in schools and training dealing in the packaging, sales, transportation and recognition of narcotics and dangerous drugs. Your Affiant has conducted over 300 investigations involving controlled substances and marijuana. Your Affiant has spoken to persons who used, transported and sold dangerous drugs, controlled substances and marijuana at least 200 times.

Your affiant has reasonable cause to believe that grounds for the issuance of a Search Warrant exist, as set forth in Section 1524 of the Penal Code, based upon the aforementioned facts and circumstances.

Your affiant prays that a Search Warrant be issued, based upon the above facts, for the seizure of said property, or any part thereof, between the hours of 7:00 am and 10:00 pm, good cause being shown therefore, and that the same be brought before this Magistrate or retained subject to the other of the court, or of any other court in

which the offense(s) in respect to which the property or things taken, is triable, pursuant to Section 1536 or the Penal Code.

/s/ Robert Rahaeuser  
(Affiant)

Subscribed and sworn to before me this 9 day of May, 1984, at 10:00 .M. (sic)

/s/ Pamela Iles  
Judge of the Municipal Court

WHEREFORE, it is prayed that a Search Warrant issue.

CECIL HICKS,  
DISTRICT ATTORNEY  
COUNTY OF ORANGE,  
STATE OF CALIFORNIA.

/s/ By: C. E. Robison  
Deputy District Attorney

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**\*EXHIBIT 1**

I hereby certify that the attached document consisting of 2 page(s) is a true and correct copy of the original search warrant on file in my office.

JAMES B. HARRIS  
Clerk & Adm. Officer

By C. Spence  
Deputy

(Filed April 16, 1984)

0600

IN THE MUNICIPAL COURT OF South  
COUNTY OF ORANGE,  
JUDICIAL DISTRICT  
STATE OF CALIFORNIA

SEARCH WARRANT



THE PEOPLE OF THE STATE OF CALIFORNIA:

TO: ANY SHERIFF, CONSTABLE, MARSHAL,  
POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE,  
STATE OF CALIFORNIA:

Proof, by affidavit, having been made this day before me by Investigator Jenny STRACNER that there is probable and reasonable cause for the issuance of the Search Warrant in accordance with Subdivision(s) 2, 3 & 4 of the Penal Code, Section 1524.

YOU ARE THEREFORE COMMANDED between the hours of 7:00 am and 10:00 pm good cause being shown therefor, to make search of the premises located at and described as:

1575 Fayette Place, Laguna Beach, County of Orange, California. Further described as a two story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door.

and the vehicle(s) described as: N/A

and the person(s) of: N/A

for the following personal property, to-wit: Cocaine, packaging materials for cocaine such as paper bindles, plastic baggies, glass vials, paraphernalia for cutting cocaine, such as razor blades, playing cards, mirrors and straws used to inhale cocaine, cutting agents for cocaine such as lactose, manitol, milksugar and procaine; scales and documents of personal property consisting of utility receipts, rent receipts, cancelled mail envelopes and telephone bills. Currency and documents tending to show narcotic transactions

including pay and owe sheets, phone numbers and addresses of other individuals involved in narcotic transactions. Also the ability to monitor incoming phone calls during the execution of the search warrant.

and if you find the same or any part thereof, to bring it forthwith before me at the Municipal Court of South Judicial District, for the County of Orange, or to any other court in which the offense(s) in respect to which the property or things taken is triable, or retain such property in your custody, subject to the order of the Court pursuant to Section 1536 of the Penal Code.

Given under my hand this 6 day of April, 1984.

/s/ Pamela Iles  
Judge of the Municipal Court

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I hereby certify that the attached document consisting of the 6 pages gives a true and correct copy of the original affidavit on file in my office.

JAMES B. HARRIS  
Clerk & Adm. Officer

/s/ By: G. Spence  
Deputy

\* EXHIBIT 2

(Filed April 16, 1984)

Sid 0600

IN THE MUNICIPAL COURT SOUTH JUDICIAL  
DISTRICT, COUNTY OF ORANGE,  
STATE OF CALIFORNIA

STATE OF CALIFORNIA )	AFFIDAVIT IN
) ss	SUPPORT OF
COUNTY OF ORANGE )	SEARCH WARRANT

Personally appeared before me this 6th day of April, 1984, Investigator Jenny STRACNER, who, on oath, makes complaint, and deposes and says:

That he has, and there is just, probable and reasonable cause to believe, and that he does believe that there is now on the premises located at: 1575 Fayette Place, Laguna Beach, County of Orange, California. Further described as a two story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door.

and in vehicle(s) described as: N/A

and on the person(s) of: N/A

the following personal property, to-wit: Cocaine, packaging materials for cocaine such as paper bindles, plastic baggies, glass vials, paraphernalia for cutting cocaine, such as razor blades, playing cards, mirrors and straws used to inhale cocaine, cutting agents for cocaine such as lactose, manitol, milksugar and procaine; scales and documents of personal property consisting of utility receipts, rent receipts, cancelled mail envelopes and telephone bills. Currency and documents tending to show narcotic transactions including pay and owe sheets, phone numbers and addresses of other individuals involved in narcotic transactions. Also the ability to monitor incoming phone calls during the execution of the search warrant.

Your affiant says that there is probable and reasonable cause to believe and that he does believe that the said property constitutes: (See P.C. § 1524) property and



things used as a means of committing a felony and are in the possession of persons with the intent to use it with the means of committing a public offense and consists of evidence which tends to show a felony has been committed and that the suspect has committed a felony.

Your affiant says that the facts in support of the issuance of the Search Warrant are as follows: that your affiant is a sworn police officer and has been so employed for three (3) years;

That your affiant, while acting in said capacity, has received the following information: During the month of February, 1984 Drug Enforcement Agent Rex McMILLAN contacted Your Affiant and advised their agency in Reno, Nevada had a subject in custody. McMILLAN stated the subject in custody related that a large U-haul moving truck was enroute to 1575 Fayette, Laguna Beach and that the truck was full of Thai, approximately 1000 pounds. McMILLAN and Your Affiant conducted an area check for the vehicle but were unable to locate it. During the month of February, 1984 Your Affiant was contacted by a citizen informant who lives at 1570 Fayette, Laguna Beach. This informant advised Your Affiant that she had observed numerous vehicle parked at 1575 Fayette and the occupants of these vehicles going into the residence and leave after only being there for approximately five minutes. The informant advised Your Affiant this activity took place between the hours of midnight (2400 hours) and four o'clock (0400 hours) in the morning. The informant also advised Your Affiant that a large U-Haul truck was parked in front of 1575 Fayette for four days, which appeared unusual to her. On February 15, 1984 Investigator

ISHMAEL and Your Affiant surveilled 1575 Fayette from eleven o'clock p.m. (2300 hours) until two o'clock (0200 hours) in the morning. During this time period Your Affiant observed four different vehicles arrive at 1575 Fayette at separate times, and leave at separate times. Neither vehicle stayed at 1575 Fayette for more than ten minutes at a time. It should be noted that on February 14, 1984 at eleven o'clock (2300 hours) at night Your Affiant surveilled the residence at 1575 Fayette until two-thirty (0230 hours) in the morning. During this time period Your Affiant observed four vehicle to arrive at separate times and depart at separate times. This type of vehicle traffic is indicative of narcotic activity. On February 23, 1984 the same citizen informant contacted Your Affiant and advised a large Jartan moving truck was parked in front of 1575 Fayette. Your Affiant then contacted investigator D. LAMBERT of the Orange County Sheriff's Department. Investigator LAMBERT arrived at the 1575 Fayette residence with his trained canine dog, Winston, to search the vehicle for any narcotics. The search had negative results. On this same date Sergeant JIMENEZ and Your Affiant followed this vehicle to 1611 Bayside Drive in Newport Beach. Your Affiant and Sergeant JIMENEZ contacted Newport Beach Police Department Investigator EVERTON in regards to 1611 Bayside Drive. Investigator EVERTON advised Your Affiant that 1611 Bayside Drive had at one time been under investigation for narcotic trafficking. On April 6, 1984 at 0600 hours Your Affiant drove past 1575 Fayette and observed four different vehicles at that residence. Your Affiant observed a white male, 6'0 175 with black hair, open the garage door at the listed address and put trash out to be picked up.

Your Affiant then contacted the trash collector and advised him that Your Affiant wanted to collect the trash at that residence. Your Affiant told the collector that the container in which the trash was to be emptied into must be clean of any other refuge. Your Affiant then observed the collector pick up the refuge at 1575 Fayette. The collector then gave the refuge to Your Affiant. Your Affiant then returned to Laguna Beach Police Department and began searching the refuge for contraband. Your Affiant found forty-two pre-folded bindles, most of which had a white residue on them, eleven straws commonly used to inhale cocaine, one paper bindle containing a white powdery substance possible cocaine, a plastic bag containing a white powder substance possibly cocaine, gross weight 3.3 grams, one glass vial and miscellaneous paperwork. It is Your Affiant's personal knowledge that subjects who sell and use controlled substances tend to keep in their residence a supply of cocaine along with paraphernalia used in the packaging and sales of controlled substances including bindles, plastic bindles, plastic baggies, scales and currency to show excessive narcotic transactions. It is also Your Affiant's opinion that there is at the premise to be searched, quantities of cocaine. Your Affiant has been a police officer for the past three years and has worked in narcotic enforcement for seven months. Your Affiant has spent over one hundred and thirty hours in schools and training dealing in the packaging, sales, transportation and recognition of narcotics and dangerous drugs. Your Affiant has conducted over fifty investigations involving controlled substances and cocaine. Your Affiant has spoken to persons who used, transported and sold dangerous drugs, controlled substances and cocaine at least fif-

teen times. Lt. Spriene conducted a presumptive test on the white powder substance in the plastic baggie and had negative results. Lt. Spriene also tested the white powder in the bindle and had a positive odor but negative on the color. It is of your affiants opinion and Lt. Spriene's opinion that the substance in the baggie was a filler used to cut cocaine and that the substance in the bindle is cocaine. However a lack of residue made the results negative. Lt. Spriene then tested a straw and received positive results. It should be noted that Lt. Spriene is currently a Lieutenant for the Laguna Beach Police Department and has been for the past 4 years. Prior to his position, Lt. Spriene worked at San Clemente Police Department and spent 4 years as an investigator in narcotic enforcement. Lt. Spriene has received training by his peers when he first became a narcotics officer. Lt. Spriene has trained personel in how to use the volttox during an eighty hour narcotic enforcement class conducted by the department of Justice. Lt. Spriene is considered an expert in court.

Your affiant has reasonable cause to believe that grounds for the issuance of a Search Warrant exist, as set forth in Section 1524 of the Penal Code, based upon the aforementioned facts and circumstances.

Your affiant prays that a Search Warrant be issued, based upon the above facts, for the seizure of said property, or any part thereof, between the hours of 7:00 am and 10:00 pm (Between the hours of 7:00 A.M. and 10:00 P.M.), good cause being shown therefore, and that the same be brought before this Magistrate or retained subject to the order of the court, or of any other court in which the offense(s) in respect to which the property or things

taken, is triable, pursuant to Section 1536 of the Penal Code.

/s/ Jenny Stracner  
(Affiant)

Subscribed and sworn to before me  
this 6th day of April, 1984, at 5:00 P.M.

/s/ Pamela Iles  
Judge of the Municipal Court

WHEREFORE, it is prayed that a Search Warrant  
issue.

CECIL HICKS, DISTRICT ATTORNEY  
COUNTY OF ORANGE, STATE OF CALIFORNIA.

/s/ BY: William John Feccia  
Deputy District Attorney

---

I hereby certify that the attached document consisting of  
4 pages is a true and correct copy of the original return  
to S/W on file in my office.

James B. HARRIS  
Clerk & Adm. Officer

BY: /s/ C. Spence  
Deputy

EXHIBIT 3

(Filed April 16, 1984)

0600

IN THE MUNICIPAL COURT OF SOUTH  
JUDICIAL DISTRICT COUNTY OF ORANGE,  
STATE OF CALIFORNIA

RETURN TO SEARCH WARRANT

The following property was taken from the premises  
located at 1575 Fayette Place, Laguna Beach, County of

Orange, California. Further described as a two story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door.

by virtue of a Search Warrant, dated April 6, 1984, and executed by the Honorable Pamela ILES, Judge of the Municipal Court of South Judicial District for the County of Orange:

Blue tote bag

plastic bag containing 43.4 grams gross weight marijuana stems

plastic bag containing 42.8 grams marijuana stems, gross weight

plastic bag containing 7.3 grams hashish, gross weight

plastic bag containing 26.6 grams hashish, gross weight

plastic bag containing 6.1 grams marijuana seeds, gross weight

plastic bag containing 20.2 grams of psilocybin mushrooms, gross weight

plastic bag containing 22.7 grams of psilocybin mushrooms, gross weight

3 boxes of Mannite (.751 oz each)

plastic baggie with white powder substance

Tupperware container

Presto briefcase

36 plastic baggies with marijuana residue

"Long" chests

blue nylon tote bag



plastic bag containing 27.8 grams marijuana stems, gross weight

2 plastic bags

plastic bag containing 61.5 grams marijuana stems, gross weight

12 plastic baggies with marijuana residue

wooden cup and rod

roll of contact paper

Ohaus scale, gray

Triple beam gray scale, serial number 26482

Ohaus heavy duty scale 20K6-45 lb

33.6 grams of white powder, gross weight

plastic baggie with 19.7 grams of white powder, gross weight

3 vials of white powder

paper bindle containing 2.2 grams of white powder

2 magazine papers with white powder residue

grinder and strainer

pill box containing two Centrax RD552 and 1 Dalmane 30 Roche with one straw and white powder residue

partically (sic) burnt marijuana cigarette

California drivers license in name of GREENWOOD, Billy E.

roach clip

"Getting Off Cocaine" book

2 marijuana cigarettes

phone bill

belt

11 plastic baggies  
 miscellaneous paperwork  
 straw with white powder residue  
 (continued on page 3a)

I, Investigator Jenny STRACNER, by whom this Warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me under the Warrant.

All of the property taken by virtue of said Warrant will be retained in my custody subject to the order of this Court or of any other Court in which the offense(s) in respect to which the property or things taken is triable.

/s/ Jerry Stracner

Subscribed and sworn to before me  
 this 16th day of April, 1984.

/s/ Pamela Iles

Judge of the Municipal Court

plastic baggie containing 8.1 grams marijuana, gross weight

Zig-Zag book and straw with white powder residue

yellow metal Ricoh watch

white and yellow metal Rolex watch

white metal Ricoh watch with white stones

Ohaus scale

Presto buck knife

2 strainers

2 packages of Zig-Zag papers

3 spoons



4 pipes

pair of hemostats

6.1 grams marijuana, gross weight

glass tray

\$845.00 U.S. currency

2 marijuana cigarettes

pack of Zig-Zag papers

pay and owe sheet

roach clip

Rolex yellow metal watch with white and red stones

Paget Quartz black watch

address book

\$217.30 U.S. currency with yellow metal money clip

2 plastic baggies

plastic bag containing hash pipe with residue

straw with white powder residue

plastic baggie containing 2 grams white powder, gross weight

straw with white powder residue

\$301.00 U.S. currency

4 white tablets in white bottle

26.5 grams of white powder

8 ounce jar of Mannitol

14 grm bottle of sparkle Mannitol

436. grams of hashish, gross weight

27.8 grams of hashish, gross weight

paper bag

850 Thunderbomb firecrackers

test tube with straw

straw

plastic baggie containing 3.1 grams white substance, gross weight

42 paper bindles

2 books of matches

10 straws with white powder residue  
glass vial

10 plastic baggies with marijuana residue

paper napkin containing fragments of marijuana

miscellaneous paperwork in name of Cathy ALLEGER  
and Bill GREENWOOD

4.2 grams of hashish, gross weight

Passport book "GREENWOOD"

Bank of America savings book

4 GTE telephone bills

rental statement for storage

GTE receipt

brown "Echolic" briefcase containing the following:

folded white package with 28 oval light brown stones

folded white package with 2 round light blue stones

folded white paper package with the following:

plastic baggie with one "Blue Topaz" stone, 4.81K

plastic baggie with one "Blue Topaz" stone, 6.59K

plastic baggie with one "Blue Topaz" stone, 4.01K

plastic baggie with one "Blue Topaz" stone, 2.20 K

plastic baggie with one "Blue Topaz" stone, 11.89K

plastic baggie with one "Blue Topaz" stone, 7.80K  
 plastic baggie with one "Blue Topaz" stone, 2.40K  
 plastic baggie with one "Blue Topaz" stone, 2.68K  
 plastic baggie with one "Blue Topaz" stone, 2.32K  
 plastic baggie with one "Blue Topaz" stone, 31.66K  
 plastic baggie with one "Blue Topaz" stone, 11.93K  
 plastic baggie with one "Blue Topaz" stone, 3.47K  
 plastic baggie with one "Blue Topaz" stone, 2.90K  
 plastic baggie with one "Blue Topaz" stone, 3.59K  
 plastic baggie with one "Blue Topaz" stone, 3.08K  
 plastic baggie with one "Blue Topaz" stone, 2.21K  
 plastic baggie with one "Blue Topaz" stone, 2.68K  
 plastic baggie with one "Blue Topaz" stone, 35.42K  
 plastic baggie with one "Blue Topaz" stone, 2.69K  
 plastic baggie with one "Blue Topaz" stone, 6.64K  
 plastic baggie with one "Blue Topaz" stone, 3.45K  
 plastic baggie with one "Blue Topaz" stone, 8.61K  
 plastic baggie with one "Blue Topaz" stone, 6.34K  
 plastic baggie with four "Amethyst" stone, 4.93K  
 plastic baggie with one "Blue Topaz" stone, no markings

Echolac pouch with one yellow metal Rolex watch

Sanyo am-fm cassette player

Supreme Torch alarm

seven \$2.00 bills

miscellaneous paperwork/files in name of "PAL-MIERI"

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## EXHIBIT 4

DR. NO.

LAGUNA BEACH POLICE DEPARTMENT  
REQUEST FOR EVIDENCE EXAMINATION

PLEASE TYPE OR PRINT

Name: Greenwood (Suspect's or If Unavailable Give Victim(s)—; L.R. No.:—; Crime: H&S 11350; Date: (Of Offense)—5/4/84; Dept: (Submitting)—; Date Results Needed: ASAP.

Item No.—Describe Each Item of Evidence to be Examined

1 Five (5) Plastic Straws.

Investigating Officer: Rahawser; Dept. Investigation;  
Phone No:—; Date of Request: 5/04/84.

Type(s) of Examination(s) Requested On Above Items:

For Laboratory Use Only

Examination Results: Each straw was cut in half and both halves placed on a grade #1 filter paper. A few grains of the control cocaine standard was placed on a grade #1 filter paper. Two drops of the reagent cobalt thiocyanate was placed on the control standard which produced a blue positive color reaction. Two drops of cobalt thiocyanate reagent was placed on each of five straws. Straw #1: Observed no blue presumptive reaction. Straw #2: Observed immediate blue presumptive positive. Straw #3: Observed immediate blue presumptive positive. Straw #4: Observed trace of blue presumptive positive and end portion of straw. Straw #5: Observed immediate blue presumptive positive.

The five (5) straws were individually sealed, the control standard was sealed. A polaroid photograph of test results was taken.

To Inv. Rahawser; Date 5/04/84

Sgt. Jimenez; Date 5/04/84

Forensic Specialist: Janet Gilliam

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ATTESTED: 9-21-84

Certified to be a true copy of the original on file in my office.

James B. Harris, Clerk, Municipal Court  
South Orange County Judicial District,  
Orange County, California

By /s/ C. Spence  
Deputy

(Filed May 17, 1984)

IN THE MUNICIPAL COURT OF  
SOUTH JUDICIAL DISTRICT  
COUNTY OF ORANGE  
STATE OF CALIFORNIA

RETURN TO SEARCH WARRANT

The following property was taken from the premises located at 1575 Fayette Place, Laguna Beach, County of Orange, California. Further described as a two-story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door. The residence to be searched is situated on the westside of Fayette Place and is the first structure south of the intersection of Panorama Drive and Fayette Place.

By virtue of a Search Warrant, dated May 9, 1984, and executed by the Honorable Pamela ILES, Judge of the —Municipal Court of South Judicial District—for the County of Orange:

white plastic baggie containing approximately 1 pound of marijuana

3 brown tinted glass vials with residue

4 plastic straws with white powder residue

1 wooden tray, 12 x 4

plastic baggie with 5.0 grams of marijuana

package of zig-zag rolling papers  
miscellaneous paperwork in name of GREENWOOD  
brown corduroy jacket "Newman" with \$310.00 U.S. currency  
wooden box with 2.5 grams of hashish  
\$1,500.00 in U.S. currency  
prefolded paper bundle containing approximately 10 grams  
of white powder (believed to be baking soda)

I, Inv. Robert RAHAEUSER, by whom this Warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me under the Warrant.

All of the property taken by virtue of said Warrant will be retained in my custody subject to the order of this Court or of any other Court in which the offense(s) in respect to which the property or things taken is triable.

/s/ Robert Rahaeuser

Suscribed and sworn to before me  
this 17 day of May, 1984.

/s/ Pamela Iles  
Judge of the Municipal Court

---

CECIL HICKS, DISTRICT ATTORNEY  
COUNTY OF ORANGE, STATE OF CALIFORNIA

MICHAEL R. CAPIZZI,  
ASSISTANT DISTRICT ATTORNEY

WILLIAM W. BEDSWORTH, DEPUTY-IN-CHARGE  
WRITS AND APPEALS SECTION

BY: MICHAEL J. PEAR,  
DEPUTY DISTRICT ATTORNEY

POST OFFICE BOX 808  
SANTA ANA, CALIFORNIA 92702  
TELEPHONE: (714) 834-3600  
Attorneys for Plaintiff

IN THE SUPERIOR COURT  
OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF		
THE STATE OF CALIFORNIA	)	CASE NO. C-55040
	)	
	Plaintiff	) Points and Authori-
		) ties In Opposition
vs.		) To Motion To Set
		) Aside Information
BILLY GREENWOOD,	)	
DYANNE VAN HOUTEN,	)	(Filed
	)	January 22, 1985)
Defendant.	)	
	)	

STATEMENT OF THE CASE

Defendants Greenwood and Van Houten are charged in a five-count information with violations of Health and Safety Code sections prohibiting possession of controlled substances for use of possession for sale.



The charges arose from searches of Greenwood's Laguna Beach residence conducted on April 6, 1984 pursuant to a search warrant and on May 12, 1984 pursuant to a second search warrant.

Defendant Greenwood moves to set aside the information pursuant to Penal Code § 995 (a motion joined by Van Houten) claiming that the magistrate erred in denying defendants' motion to quash the search warrants and suppress all evidence seized thereunder.

Defendant claims that warrantless trash searches of Greenwood's garbage (set forth in the affidavits for each search warrant) was unlawful and that without that allegedly unlawfully seized information, the affidavits fail to provide probable cause for issuance of the warrants.

Defendant Greenwood also alleges that the warrants were invalid because probable cause to search both the main house and guest house had not been demonstrated.

Defendant Van Houten additionally argues that insufficient evidence was presented to establish her knowledge of the presence (or nature) of cocaine seized from her purse and that at most only possession for use (Count II) was established rather than possession for sale (Count I).

#### STATEMENT OF FACTS

The People adopt defendants statements as fair and accurate statements for the purpose of this motion with some additions:

Following receipt of information from both a DEA agent and from a neighbor of defendant, police main-

tained surveillance of the residence confirming traffic indicative of narcotic activity.

On April 6, 1984, at 6:00 a.m. Investigator Stracner observed a male adult open the garage door and put trash out to be picked up. The investigator contacted the trash collector and requested that the trash (clear of any other refuse) be turned over to the investigator.

The investigator took it to the police department where it was searched revealing incriminating evidence as set forth in the affidavit.

On May 4, 1984, with knowledge of the information Stracner had received, knowledge of the arrests and seizure of drugs which occurred April 6, 1984, plus citizen informant information between April 16, 1984 and May 3, 1984 of increased vehicular traffic, Investigator Rahauser requested the trash collector to retrieve refuse located in front of the house and bring it back to the officer.

Rahauser took it to the police department where he discovered evidence indicative of drug trafficking as set forth in the affidavit.

#### ISSUES PRESENTED

- I. WERE THE WARRANTLESS TRASH SEARCHES UNLAWFUL?
- II. WERE THE SEARCH WARRANTS ISSUED UPON SUFFICIENT PROBABLE CAUSE INDEPENDENT OF THE TRASH SEARCHES?
- III. DOES SUBSTANTIAL EVIDENCE SUPPORT THE POSSESSION AND POSSESSION FOR SALE CHARGES AGAINST VAN HOUTEN?

## ARGUMENT

### I.

#### THE WARRANTLESS TRASH SEARCHES OF DEFENDANT GREENWOOD'S DISCARDED GARBAGE DID NOT VIOLATE THE FOURTH AMENDMENT RIGHTS OF EITHER DEFENDANT.

Initially it should be recognized that defendant Van Houten lacks standing to challenge the validity of the search of Greenwood's trash.

California courts have consistently recognized and applied its "vicarious exclusionary rule" in prosecutions for crimes committed on or before June 8, 1982. (See, e.g., *People v. Chapman* (1984) (36 Cal.3d 98, 105, fn. 3; *People v. Gale* (1973) 9 Cal.3d 788, 793; *Kaplan v. Superior Court, supra*, 6 Cal.3d 150, 156-157.) On that date California voters passed an initiative measure which added, inter alia, section 28, subdivision (d), to article I of the California Constitution (hereafter section 28(d)). Section 28(d), popularly known as the "Truth-in-Evidence" provision, states, in part, that "relevant evidence shall not be excluded in any criminal proceeding. . . ."

It is apparent that section 28(d) is in direct conflict with the state's judicially-created vicarious exclusionary rule. Given such a conflict, the superior authority of this constitutional provision, and it's clear, unambiguous language, we conclude that section 28(d) abolishes the "vicarious exclusionary rule" and prohibits courts from excluding relevant evidence. [*People v. Johnson* (1984) 85 Daily Journal DAR 56; *People v. Tellez* (1984) 161 Cal.App.3d 1067, 1069-1070; *People v. Daan* (1984) 161 Cal.App.3d 22, 25]

. . . . A defendant can only challenge a violation of his own reasonable expectation of privacy. He cannot assert the illegality of the search of a third per-

son makes inadmissible as to him the evidence seized in the course of the illegal search. (*United States v. Salvucci* (1980) 448 U.S. 83 [65 L.Ed.2d 619, 100 S.Ct. 2547]; *Rawlings v. Kentucky* (1980) 448 U.S. 98 [65 L.Ed.2d 633, 100 S.Ct. 2556]; *Rakas v. Illinois* (1978) 439 U.S. 128 [58 L.Ed.2d 387, 99 S.Ct. 421].) [*People v. Daan*, 161 Cal.App.3d at 27.]

Defendant Greenwood is correct in his view that *People v. Krivda*, *infra*, decided in 1971 prohibited the trash searches conducted in the case at bar.

The People contend, nonetheless, that the magistrat's ruling was correct. In light of Proposition 8 and federal authority, including U.S. Supreme Court decisions since *Krivda*, involving the scope of the Fourth Amendment in contexts other than trash searches, to the extent that *Krivda* purported to be based on federal grounds, it was erroneously decided and is not of continuing validity.

In *People v. Krivda* (1971) 5 Cal.3d 357, the California Supreme Court, in a 4 to 3 decision held that a warrantless trash search violated defendant's reasonable expectation of privacy.

The U.S. Supreme Court granted certiorari, but being unable to determine whether *Krivda* had been decided on federal grounds, state grounds or both, they vacated and remanded for clarification. (34 L.Ed.2d 45)

The California Court, which had in the earlier opinion made no mention of the California Constitution responded:

Pursuant to the mandate hereinabove quoted we have reexamined our opinion in the subject case (reported at 5 Cal.3d 357 [96 Cal.Rptr. 62, 486 P.2d 1262]) and certify that we relied upon both the Fourth Amendment to the United States Constitution and

article I, section 19, of the California Constitution, and that accordingly the latter provision furnished an independent ground to support the result we reached in that opinion. Inasmuch as we deem it unnecessary to alter or amend our prior decision, we reiterate that decision in its entirety.

Let the remittitur issue forthwith.

[*People v. Krivda* (1973) 8 Cal.3d 623, 624]

The enactment of Article I § 28(d) (Proposition 8—Truth in Evidence) abolished, in California, independent state grounds as a basis for excluding relevant evidence. [*People v. Johnson, supra*; *People v. Tellez, supra*; *People v. Daan, supra*; *People v. Chavers* (1983) 33 Cal.3d 462, 467; *People v. Ramirez* (1984) 162 Cal.App.3d 70; *People v. Helmquist* (1984) 161 Cal.App.3d 609; *People v. Anderson* (1983) 149 Cal.App.3d 1161, 1164-1165]

Decisions by California Appellate Courts and by the United States Supreme Court since *Krivda* was decided over 13 years ago demonstrate that California often elected to afford suspects a broader security against unreasonable searches than that required by the United States Supreme Court or by the Fourth Amendment. [e.g. *People v. Chapman* (1984) 36 Cal.3d 98, 106; *People v. Brisdendine* (1975) 13 Cal.3d 528, 549] Further, California court's post *Krivda* guesses at what federal law requires have been demonstrated to be wrong. [Compare *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, holding that a search of posted, fenced property violated the Fourth Amendment, saying:

The absolute limitation placed upon Fourth Amendment protection under the "open fields" doctrine of



another era (see *Hester v. United States* (1924) 265 U.S. 57 [68 L.Ed. 898, 44 S.Ct. 445]) is no longer viable. (at 426)

with *Oliver v. United States* (1984) 80 L.Ed.2d 214 which held that officers driving past a locked gate, entering posted "No Trespassing" signs to discover defendant's marijuana violated neither the Fourth Amendment, *Katz* nor the still viable open fields doctrine of *Hester*.

Steps taken to protect privacy, such as planting the marihuana on secluded land and erecting fences and "No Trespassing" signs around the property, do not establish that expectations of privacy in an open field are *legitimate* in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity, but whether the government's intrusion infringes upon the personal and societal values protected by the Amendment. The fact that the government's intrusion upon an open field is a trespass at common law does not make it a "search" in the constitutional sense. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. (80 L. Ed.2d at 220)

Every federal circuit court of appeals considering the issue has concluded that warrantless trash searches do not violate the Fourth Amendment. [*United States v. Mustone* (1st Cir.) (1972) 469 F.2d 970; *United States v. Terry* (2nd Cir.) (1983) 702 F.2d 299; *United States v. Reichert* (3rd Cir.) (1981) 647 F.2d 397; *United States v. Crowell* (4th Cir.) (1978) 586 F.2d 1020; *United States v. Vahalik* (5th Cir.) (1979) 606 F.2d 99; *Magda v. Benson* (6th Cir.) (1976) 536 F.2d 111; *United States*

*v. Shelby* (7th Cir.) (1978) 573 F.2d 971; *United States v. Biondich* (8th Cir.) (1981) 652 F.2d 743]

In *United States v. Dzialak* (1971) 441 F.2d 212, the 2nd Circuit said in rejecting the idea (embraced by *Krivda*) that municipal trash ordinances negate abandonment.

We are not persuaded. We think it abundantly clear that Dzialak abandoned the property. The town ordinance simply cannot change the fact that he "threw [these articles] away" and thus there "can be nothing unlawful in the Government's appropriation of such abandoned property." *Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960).

Appellant alleges further that the search warrants obtained December 4, 1967 were improperly issued. The first contention is that their issuance was based primarily on the fruits of what has been contended to be an illegal search and seizure by Poling. Since we have already held that the searches by Poling were legal, we need not concern ourselves with this part of the argument. It is contended further, however, that the warrants, which were issued on the basis of Gray's affidavit rather than Poling's, were issued without probable cause. (441 F.2d 212, 215 cert. den. 30 L.Ed.2d 165)

In *United States v. Reicheter*, *supra*,

Defendant claims that under *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), he had a reasonable expectation of privacy in the trash he placed in a public area to be picked up by trash collectors such that, when the police officers looked through the garbage and seized the methamphetamine, they violated the fourth amendment. A mere recitation of the contention carries with it its own refutation.



Every circuit considering the issue has concluded that no reasonable expectation of privacy exists once trash has been placed in a public area for collection. The reasoning underlying these decisions is clear and persuasive. As stated by the Seventh Circuit in *Shelby*:

[T]he placing of trash in garbage cans at a time and place for anticipated collection by public employees for hauling to a public dump signifies abandonment.

*Id.* 573 F.2d at 973. Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. If he had such an expectation, it was not reasonable. Accordingly, the district court properly denied his motion to suppress. (647 F.2d at 399)

In *U.S. v. Crowell, supra*, the court recognized *Krivda*, but said:

. . . we think that the better view is that expressed by every United States Court of Appeals that has had reason to address the issue.

. . . .

In accord with those cases, our view is that, absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection. The act of placing it for collection is an act of abandonment and what happens to it thereafter is not within the protection of the fourth amendment. (586 F.2d at 1025 cert. den. 59 L.Ed.2d 772)

*Vahalik, supra*, also rejected *Krivda* or the argument that trash ordinances negate abandonment.

We prefer the view adopted by every United States Court of Appeals to consider the issue, that the act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection because, "absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection."

. . . .

The municipal ordinance cited by appellate does not alter the application of this rule in the instant case because there is no indication in the record that appellant relied upon the ordinance to increase his expectation of privacy, or that he was even aware of the ordinance. The purpose of the ordinance was, presumably, sanitation and cleanliness, not privacy. (606 F.2d at 101 cert.den. 62 L.Ed.2d 765)

In *Magda v. Benson, supra*,

Magda contends that the warrantless search of his garbage by postal inspectors violated his reasonable expectation of privacy and that evidence so obtained cannot be the basis of a valid search warrant under the Fourth Amendment. District Judge Leroy J. Condie rejected Magda's contention. His decision is supported by federal case law, which holds that garbage under such circumstances is abandoned and no longer protected by the Fourth Amendment. 536 F.2d at 112.

In *U.S. v. Shelley, supra*, the court held:

As we see the issue, it is whether or not the search of the trash constituted a violation of the defendant's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is defendant's position that he had a reasonable expectation of privacy in his trash since he

contemplated that it would be collected and disposed of by intermingling with other trash and eventually destroyed. Perhaps the defendant did in fact believe that the incriminating evidence of his crime so disposed of would go undetected. If defendant did, we view it only as additional bad judgment on his part. In the real world to so view the status of one's discarded trash is totally unrealistic, unreasonable, and in complete disregard of the mechanics of its disposal.

. . . .

It therefore seems to be more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California.

The Court found *Krivda* "is too unrealistic to be pursued." (573 F.2d at 974 cert.den. 58 L.Ed.2d 139)

The Court, relied in part on *Lewis v. U.S.*, 17 L.Ed.2d 312, in finding no Fourth Amendment violation by police instructing trash collector to act for them. (573 F.2d at 974, fn.7)

In *U.S. v. Biondich*, *supra*,

The two inspections of Biondich's garbage occurred in the same manner: A police officer from the Minneapolis police department approached an employee of the private garbage-hauling service that regularly collected trash from Biondich's house and made arrangements to meet the collector in a parking lot about one block from Biondich's house in the usual manner, except that he dumped the cans to one side of the collection bin to keep it separate from the garbage from other houses. He did not compact the trash into the truck and he proceeded to the meeting place where the officer looked through the bin and collected the items in question. (652 F.2d at 744-745)

The court held:

When a person makes arrangements with a sanitation service to have the items picked up, however, and when the items are placed in the designated place for collection and the regular collector makes the pickup in the usual manner on the scheduled collection day, the person loses his or her legitimate expectation of privacy in the items at the time they are taken off his or her premises. (at 745)

In *Abel v. United States* (1960) 4 L.Ed. 668 the court upheld a search of a hotel room wastepaper basket immediately after defendant had paid his bill and vacated the room.

Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were bona vacantia. There can be nothing unlawful in the Government's appropriation of such abandoned property. (4 L.Ed.2d at 687)

*Krivda* requires reexamination! It was not, and is not, federal law.

Additionally, the People contend that the magistrate's ruling was correct because there was probable cause to search the trash thus distinguishing the facts from *Krivda*. (See, *People v. Parker* (1974) 44 Cal.App.3d 222, 229; *People v. Stewart* (1973) 34 Cal.App.3d 695, 700; *People v. Cohen* (1976) 59 Cal.App.3d 241, 245)

## II.

SUFFICIENT PROBABLE CAUSE EXISTED  
EVEN WHERE THE EVIDENCE SECURED  
FROM THE TRASH SEARCHES IS EXCISED  
FROM THE AFFIDAVIT.

It has been recognized that the court may view the affidavit excising information unlawfully seized. (e.g. *Parker, supra* at 229)

The standard for determining probable cause, past Proposition 8 is found in *Gates v. Illinois* (1983) 76 L.Ed. 2d 527, applicable in California. [*People v. Ramirez* (1984) 162 Cal.App.3d 70]

In *Gates, supra*, the police received an anonymous letter reporting that Mr. and Mrs. Gates were involved in drug trafficking describing an imminent Florida trip. The police corroborated details of the tip independently. The corroboration showed that the Gates made the trip and drove a car. A search warrant of the residence and automobile issued. The trial court and Illinois Supreme Court ruled that probable cause was not established and ordered the evidence suppressed.

The United States Supreme Court reversed:

. . . "the term 'probable cause,' according to its usual acceptance, means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the quanta . . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, nu-

merically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause." (76 L.Ed.2d at 546)

The Court abandoned the so-called "two-pronged test of *Aguilar* and *Spinelli* and adopted a totality of circumstances analysis.

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. (76 L.Ed.2d at 548)

The court further found that:

The corroboration of the letter's predictions that the Gates' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomington all indicated, albeit not with certainty, that the informant's other assertions also were true. "Because an informant is right about some things, he is more probably right about other facts,"

. . . .

It is enough, for purposes of assessing probable cause, that "corroboration through other sources of information reduced the chances of a reckless or prevaricating tale," thus providing "a substantial basis for crediting the hearsay." (at 552)



Following *Gates*, the United States Supreme Court considered the issue of probable cause in *Massachusetts v. Upton* (1984) 80 L.Ed.2d 721.

There, an informant advised police of "a motorhome full of stolen stuff" at a specific location. The informant said she was defendant's girlfriend, saw the property and related facts showing knowledge about an earlier search of a motel room involving stolen property.

The Massachusetts Supreme Court said no probable cause. The U.S. Supreme Court reversed.

Following the phone call, Lt. Beland went to Upton's house to verify that a motor home was parked on the property. (80 L.Ed.2d at 725)

The Court said:

The facts that tended to corroborate the informant's story were that the motor home was where it was supposed to be, that the caller knew of the motel raid which took place only three hours earlier, and that the caller knew the name of Upton and his girlfriend. But, much as the Supreme Court of Illinois did in the opinion we reviewed in *Gates, supra*, the Massachusetts court reasoned that each item of corroborative evidence either related to innocent, nonsuspicious conduct or related to ~~an~~ event that took place in public. (at 726)

The Court found that:

. . . the pieces fit neatly together and, so viewed support the magistrate's determination that there was "a fair probability that contraband or evidence of crime" would be found in Upton's motor home.

In the case at bar, the affidavit of April 6, 1984 relates information from DEA Agent McMillan describing



information from an arrestee of a U-Haul truck bringing a controlled substance to a specific address. Independent of that, the affiant received information from a citizen informant neighbor suggesting late traffic in and out of the residence, and reporting a U-Haul parked in front of it. The affiant surveilled the residence and observed vehicle traffic indicative of narcotic activity. The affiant followed one vehicle to another location previously under investigation for drug trafficking.

. . . the police observed a large number of persons visiting defendant's residence. In three days of surveillance, 22 visits took place. Most of the visitors came in the evening and stayed only a short time. Their arrivals and departures were staggered so that there was rarely more than one visitor at the home at any one time. Frequent brief visits to a residence by numerous persons is an indication of narcotic traffic.

. . . .

The officer making the affidavit in this case related his extensive experience in the field of narcotics investigations. He stated that in his opinion the frequent comings and goings from the defendant's residence and his narcotics arrest record, among other things, indicated narcotics were being dealt from that residence.

"It is fundamental that an officer's observations can give rise to probable cause [for a search] . . . if that officer had sufficient training and experience from which to draw the conclusions necessary to create a reasonable belief in the presence of contraband." Therefore, this officer's opinion was another factor the magistrate could legitimately consider in determining probable cause for the search. [*People v. Kershaw* (1983) 147 Cal.App.3d 750, 759 and 760]

The affidavit in support of the second warrant (May 9, 1984) incorporated all the information of the prior affidavit as well as evidence seized during the first search and additional information from the citizen informant of traffic in and out of the address.

A suspect's narcotics arrest record is relevant to the magistrate's determination of probable cause. The combination of a defendant's narcotics arrests and suspicious traffic to and from his residence was held to support probable cause for a search. . . . [*Kershaw, supra*, 147 Cal.App.3d at 760]

The scope of the warrants directing searches of the home at 1575 Fayette with a tan guest house is valid.

Cases dealing with multiple family apartments are distinguishable. A guest house like a guest room is part of the owner's residence. Or, the warrant could be viewed as authorizing a search only of the house which is described as a particular residence that has a guest house. In the latter case, however, search of the guest house which uncovered only a scale was improper.

In *United States v. Leon* (1984) 468 U.S. —, 82 L.Ed.2d 677, 104 S.Ct. —, it was held that the exclusionary rule was modified so as not to bar evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but later found unsupported by probable cause.

In *Massachusetts v. Sheppard* (1984) 82 L.Ed.2d 737, the court upheld a search where a preprinted warrant for drugs was issued in a homicide investigation when the magistrate failed to make clerical changes.

This case involves the application of the rules articulated today in *United States v. Leon*, — U.S. —, 72 L.Ed.2d 677, 104 S.Ct. —, to a situation in which police officers seize items pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge. (82 L.Ed.2d at 741.)

The court concluded:

In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." (at 745.)

Similarly, in *People v. Macavoy* (1984), 84 Daily Journal D.A.R. 4150, the court upheld the search. While concluding that the warrant on its face was generally void because it constitutionally failed to describe particularly the place to be searched, one room of a fraternity house, rather than the entire house, the court held that *Leon* and *Sheppard* apply.

In *Sheppard*, the officer sought a warrant authorizing a search for evidence of a murder. Instead, he received a warrant authorizing a search for controlled substances. We believe that this patent error would have been obvious to a layman, and even more obvious to a police officer who had at least some familiarity with the Fourth Amendment's particularity requirement. The defect in the present case, however is far less obvious than that in *Sheppard* and requires a deeper knowledge of Fourth Amendment law to detect. We therefore believe it was reasonable, even in the absence of additional verbal assurances, for Officer White and his fellow officers to believe that the war-

rant they received authorized the search the [sic] conducted.

Because Officer White and the other officers involved in the search had an objectively reasonable good faith belief that the warrant authorized the search they conducted, we are compelled to conclude that the evidence produced by that search should not be suppressed. (*Macavoy*, at 4152; see also *People v. Helmquist* (1984) 161 Cal.App.3d 609 holding that *Leon* applies in California post Proposition 8; see also *People v. Daan* (1984) 161 Cal.App.3d 22; *People v. Tellez* (1984) 84 Daily Journal D.A.R. 3900.)

#### IV.

#### THE CHARGES AGAINST VAN HOUTEN ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Defendant's argument regarding possession for sale versus possession erroneously concludes that the magistrate's finding was a finding of fact. It wasn't. It was a legal conclusion based in part on opinions based on facts. If the magistrate found that the amount wasn't as shown or wasn't in the form described, that is a finding of fact.

*People v. Slaughter* (1984) 35 Cal.3d 629, 639 on which defendant purports to rely, explains the distinction by discussing prior cases:

In *People v. Beagle* (1972) 6 Cal.3d 441 [99 Cal. Rptr. 313, 492 P.2d 1], the magistrate dismissed a count charging defendant with setting a fire at Lewin's Furniture Store, stating that the evidence was "too weak" because it failed to show motive. (P. 457.) The prosecutor filed an information which included the dismissed count, and defendant was convicted on the charge. On appeal, we stated that "[i]f the magistrate had found *as a matter of fact* that de-

fendant had not started the Lewin's fire, the district attorney might well have been bound by his determination. [Citing *Jones v. Superior Court*, *supra*, 4 Cal. 3d 600.] The district attorney, however, need not accept the magistrate's legal conclusion." (Pp. 457-458.) Since the magistrate made no express findings, we did not inquire whether substantial evidence might support a finding, but instead held that "the magistrate's ruling as to the Lewin's count was patently *erroneous as a matter of law . . .*" (P. 458, italics added.)

In *Pizano v. Superior Court* (1978) 21 Cal.3d 128 [145 Cal.Rptr. 524, 577 P.2d 659], the victim of a robbery was killed when Pizano's codefendant used the victim as a shield from gunfire. The magistrate dismissed the murder charge against defendant on the ground that the prosecution failed to prove malice. Our opinion noted that "an offense not named in the commitment order may not be added to the information if the magistrate made *factual findings* which are fatal to the asserted conclusion that the offense was committed . . . . When, however, the magistrate either expressly or impliedly accepts the evidence and simply reaches the ultimate *legal conclusion* that it does not provide probable cause . . . . such conclusion is open to challenge by adding the offense to the information." (P. 133.) *We then held that the magistrate's determination "was a legal conclusion, not a finding of fact as that term is used in Jones.* Therefore, the People were entitled to challenge his action by recharging the murder count." (Pp. 133-134.)

The burden on the prosecution at the preliminary hearing is to produce evidence of a reasonable probability (i.e. enough to induce a strong suspicion in the mind of a man of ordinary caution or prudence) that a crime has been committed and that the defendant is the guilty person. *People v. Davidson* (1964) 227 Cal.App.2d 331, 334.

On review of a preliminary hearing, however, the order of the magistrate holding the defendant to answer is to be upheld if the evidence supplies "some rational ground" for assuming that the defendant has committed an offense. *Williams v. Superior Court* (1969) 71 Cal.2d 1144; *People v. Harris* (1975) 52 Cal.App.3d 419. Every legitimate inference that may be drawn from the evidence must be drawn in favor of the prosecution. *Rideout v. Superior Court* (1967) 67 Cal.2d 471.

It was not unreasonable to assume the possibility that Van Houten knowingly possessed that which was in her purse. That other inferences are possible does not defeat probable cause.

Wherefore defendants' motions should be denied.

DATED this 21st day of January, 1985.

Respectfully submitted,

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COUNTY OF ORANGE  
STATE OF CALIFORNIA  
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WRITS AND APPEALS SECTION

BY: /s/ Michael J. Pear  
DEPUTY DISTRICT ATTORNEY

Receipt of the above is  
hereby acknowledged by:

/s/ Joseph S. Demo  
Public Defender's Office

Date Received: January 22, 1984

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IN THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA  
COUNTY OF ORANGE

Portion of Reporters Transcript of 1-25-85 and 2-1-85  
on Motion to Set Aside Information.

(By Mr. Pear for the People)

But I would indicate to the Court, the People's position is that the magistrate was right on concluding that in view of what has happened in Federal Court decisions since Krivda and in view of United States Supreme Court decisions in other Fourth Amendment areas besides trash searches and in view of the enactment of Prop . . . 8, Krivda which was an incorrect statement of federal law at the time it was made, is certainly an incorrect statement of either California or federal law currently and should be reversed. And it may well be, as Mr. Garey's indicated, that it is the California Supreme Court or the United States Supreme Court that have the power to do so. (RT 9:4-15)

MR. GAREY: If the United States Supreme Court takes up trash can search issues and rules consistent with the Federal Circuit Court cases that changes the complexion of where we're at right now completely. Unfortunately for the People, that hasn't happened.

There are only two courts in this country that can help the People out, and where we are right now isn't one of them. If they want to hold out and taken an appeal to D.C.A. and see if they can get a hearing granted in front of California Supreme Court, maybe they'll have luck.

We have put almost all of our argument on the Fourth Amendment, frankly, because of Proposition 8. We don't



have to really get into the merits of the validity of Proposition 8 so long as the rulings in Krivda as to the Fourth Amendment stands or at least until the California Supreme Court or the U.S. Supreme Court says otherwise. (RT 15:25-16:13)

\* \* \*

Krivda says the law is that the Fourth Amendment prohibits the kind of trash can pick up involved in this case.

There are only, as I indicated, two courts powerful enough to overturn that ruling. One is United States Supreme Court which hasn't taken up the issue. The other is the California Supreme Court which hasn't taken up the issue. They may take up the issue in the case of Greenwood and Van Houten, however. (RT 22:25-23:8)

(By The Court)

It's difficult when you find a case on the federal level that is much more well-reasoned than the California Supreme Court case involving People versus Krivda. And it's difficult for a trial court when you look at the rationality, in my opinion, of the Krivda decision. (26:21-25)

I think your argument's correct. I think I'm bound distastefully to grant your 995 which I'm doing at this time. Also I'm hopeful and would encourage the prosecution to appeal this.

There is a horrendous situation in terms of trash in this Court's opinion. Looking at Page 368 of Krivda, it's, apparently, an invasion of privacy if we rummage through a trash can; but once that trash can is put near other trash, we can rummage through it. I have difficult time following that rationale. (RT 27:20-28:3)

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(3)  
No. 86-684

Supreme Court, U.S.  
**E I L E D**

**JUL 31 1987**

JOSEPH F. SPANIOL, JR.  
CLERK

**In The  
Supreme Court of the United States**

**October Term, 1987**

— o —  
**CALIFORNIA,**

*Petitioner,*

**v.**

**BILLY GREENWOOD AND  
DYANNE VAN HOUTEN,**

*Respondents.*

— o —  
**ON WRIT OF CERTIORARI TO THE COURT  
OF APPEAL OF THE STATE OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT**

— o —  
**BRIEF FOR PETITIONER**  
— o —

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**QUESTION PRESENTED**

**DO WARRANTLESS TRASH SEARCHES OF DIS-  
CARDED GARBAGE VIOLATE THE FOURTH AND  
FOURTEENTH AMENDMENTS?**

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## OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, is published as *People vs. Billy Greenwood*, et al. [182 Cal.App.3d 729; 227 Cal.Rptr. 539 (1986).] A copy of this opinion appears in the appendix to the printed Petition for Certiorari at pages 9-15.

The Order of the California Supreme Court denying Petition for Review appears in the appendix to the printed Petition for Certiorari at page 16.

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## JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, was filed June 23, 1986.

A timely Petition for Review was denied by the California Supreme Court on August 28, 1986.

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a Writ of Certiorari runs from the date of the refusal to review. [*American Railway Express v. Levee*, 263 U.S. 19, 20-21 (1923).]

This petition, filed within 60 days of that date, is timely. This Court's jurisdiction is invoked under 28 USCA section 1257(3).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

“[N]or shall any State deprive any person of life, liberty or property, without due process of law . . .” U.S. CONST. amend XIV, Section 1.

### *“Right to Truth in Evidence.”*

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceedings, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.” Cal. CONST. art. I, section 28, subdivision (d).

### California Penal Code Section 995:

[When indictment or information must be set aside]

(a) Subject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:

(1) If it is an indictment:

(A) Where it is not found, endorsed, and presented as prescribed in this code.

(B) That the defendant has been indicted without reasonable or probable cause.

(2) If it is an information :

(A) That before the filing thereof the defendant has not been legally committed by a magistrate.

(B) That the defendant had been committed without reasonable or probable cause.

(b) In cases in which the procedure set out in subdivision (b) of Section 995a is utilized, the court shall reserve a final ruling on the motion until those procedures have been completed.

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### STATEMENT OF THE CASE<sup>1</sup>

Respondents were charged with felony narcotic offenses after contraband was twice discovered in Greenwood's home during the execution of two different search warrants in 1984. Both warrant affidavits included incriminating information obtained from warrantless searches and seizures of trash Greenwood left for collection at the curb. While the preliminary hearing magistrate upheld each warrant, the superior court disagreed and granted Greenwood's and Van Houten's motion to set aside the information, concluding their motion to suppress evidence seized pursuant to the warrants should have been granted at the preliminary hearing. (C.T. 261, J.A. 75)

The Court of Appeal affirmed the dismissal based on the 1971 decision of the California Supreme Court in *Peo-*

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<sup>1</sup> The designation "J.A." refers to the Joint Appendix; "C.T." to the Clerk's Transcript; and "R.T." to the Reporter's Transcript.

*ple vs. Krivda*, 5 Cal.3d 357, which held that warrantless trash searches violate the Fourth Amendment. The California Supreme Court denied the People's Petition for Review. The Petition for Writ of Certiorari was granted.

Based on tips received by the Laguna Beach Police Department that respondent Greenwood was involved in drug trafficking, investigators conducted warrantless trash searches of Greenwood's garbage on April 6, 1984 and on May 4, 1984. Each time, at the investigator's request, the regular trash collector picked up the plastic garbage bags which the resident had placed outside the curtilage in the public street in front of the single family residence with a detached guest house. (J.A. 4-7)

The collector placed the bags in the bin of his truck and drove down the street where he turned the bags over to the police investigator who took the bags to the police department where the contents were examined. (J.A. 4-7)

Both times evidence of drug trafficking was uncovered which was used to obtain search warrants, each of which led to the seizure of drugs in the residence and the instant prosecution. The affidavits in support of the search warrants detailed the trash collection. (J.A. 32-33, 40-41)

The respondents moved to quash the search warrants in Municipal Court claiming the warrantless trash searches violated the Fourth Amendment. (J.A. 2-4) The magistrate denied their motion. (J.A. 4) An information charging the offenses was filed in the Superior Court. (J.A. 10) In the Superior Court, respondents moved to set aside the information claiming the warrantless trash searches violated the Fourth Amendment. (J.A. 15)

The People argued that *Krivda*, on which respondents relied, was an incorrect statement of federal law. (J.A. 53, 74)

The Superior Court, although expressing dissatisfaction with *Krivda*, granted respondents' motion to set aside the information on February 1, 1985, ordered the case dismissed, and ordered the respondents discharged. (J.A. 75; See also C.T. 261)

The Court of Appeal of the State of California, Fourth Appellate District, affirmed the dismissal on June 23, 1986:

"Despite holdings to the contrary in our federal courts, this court is bound by *Krivda* unless or until the United States Supreme Court addresses the same question or our own Supreme Court overrules *Krivda*." (App Pet for Cert. 14)

The California Supreme Court denied the People's Petition for Review on August 28, 1986. (App Pet for Cert. 16)



### SUMMARY OF ARGUMENT

There is no Fourth Amendment violation in examination by police officers of the contents of trash bags an individual voluntarily places outside the curtilage in a public street for collection.

An individual has no subjective expectation of privacy in such discarded trash which has been knowingly ex-

posed to the public. Even if he has such an expectation, it is not reasonable.

The act of placing trash out for collection constitutes an abandonment of the trash to, at the very least, the trash collector, and constitutes an abandonment of an expectation of privacy to anyone who examines it, whether that person is the trashman, a neighbor, a scavenger or the police conducting a focused investigation.

Neither the trashman nor the police have a constitutional obligation to aid an individual in concealing his criminal activity by commingling his trash with that of other citizens before examining it. An individual who hopes this will occur assumes the risk that the person to whom he voluntarily entrusts his discarded trash may turn it over to the police, may be an agent of the police, or may be the police.

The unanimous view of the federal courts of appeal as well as the view of the majority of the state courts considering the issue support petitioner's position. An individual's trash placed outside the curtilage for collection or removed from the curtilage by the authorized collector is not protected from governmental examination by the Fourth Amendment.

## ARGUMENT

### AN INDIVIDUAL'S TRASH PLACED OUTSIDE THE CURTILAGE FOR COLLECTION OR REMOVED FROM THE CURTILAGE BY THE AUTHORIZED COLLECTOR IS NOT PROTECTED FROM POLICE EXAMINATION BY THE FOURTH AMENDMENT.

The Touchstone of the Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy" *Katz vs. United States*, 389 US 347, 360 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? (See *Smith vs. Maryland*, 442 US 735 (1979).)

Here respondent failed to manifest such a subjective intent. He neither maintained that which he wished to conceal in his residence, or within the curtilage. He neither burned nor shredded the items which became the basis for search warrants.

There is nothing unfair about requiring that people not discard things that they want to keep secret, or destroy them before they do. ( *United States vs. Kramer*, 711 F.2d 789 (7th Cir.) cert.den. 464 U.S. 962 (1983).)

A hope of privacy is not equivalent to an expectation of privacy (*California vs. Ciraolo*, 476 US —, 90 L.Ed.2d



210 (1986); *California vs. Rooney*, 483 US —, — (1987) (White, J., dissenting).) Respondent knowingly exposed evidence of his drug activities by depositing it on a public street.

Even assuming respondents had an expectation of privacy, steps taken to protect privacy do not establish that expectations of privacy are legitimate (*Oliver vs. United States*, 466 US 170 (1984).) The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment (*Oliver*, supra at 182-183). It is common knowledge that discarded garbage bags are visited by animals, children and scavengers looking for items such as recyclable cans, clothing and household furnishings.

Any distinction between examination of trash by trash collectors or scavengers on the one hand and by the police on the other is untenable. If property is exposed to the general public, it is exposed in equal measure to the police. (*Calif. vs. Ciraolo* 476 US —, 90 LEd2d 210; *California vs. Rooney*, supra, (White, J., dissenting))

And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. (*United States vs. Jacobsen*, 466 US 109, 122, fnt 22 (1984))



It has been recognized in California that one has no reasonable expectation that discarded trash will remain secret from the trash collector. (*People vs. Gray*, 63 Cal. App.3d 282, 133 Cal.Rptr. 698 (1976))

It has also been appreciated that:

“Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children may rummage through one’s trash barrels and remove some of its contents.” (*Krivda*, supra, 5 Cal.3d at 367)

Although the Fourth Amendment only prescribes governmental action, the determination of a reasonable expectation of privacy isn’t made by viewing the individual’s subjective expectation of not being discovered by the police. Only if there is first a legitimate expectation of privacy does governmental intrusion implicate the Fourth Amendment. If an individual can’t reasonably assume that his discarded trash is immune to inspection by the trash collector, neighbors, scavengers or recyclable can enthusiasts, he cannot entertain a reasonable expectation of privacy in such refuse. Thus governmental examination does not intrude on his right to privacy.

Respondents’ trash was placed in the street for the purpose of conveying it to a third person, the trash collector, who picked it up. This court has repeatedly held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.

(*Smith vs. Maryland* 442 US at 743-744; *United States vs. Miller*, 425 US 435)

. . . the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Governmental authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. (*U.S. vs. Miller* 425 US at 443)

Most courts have concluded that trash placed for collection outside the curtilage or removed from the curtilage by the trash collector is abandoned property. (e.g. *United States vs. Dela Espirella* 781 F.2d 1432 (9th Cir. 1986))

The California Court has suggested that such trash is abandoned only as to the trash collector (*People vs. Edwards* 71 Cal.2d 1096, 1104; *People vs. Krivda* 5 Cal.3d 357, 366 and at 369 Wright, C.J., dis.)

The primary object of the Fourth Amendment is to protect privacy, not property, and the question isn't whether respondent abandoned his interest in the property sense but whether he retained a subjective expectation of privacy that society accepts as objectively reasonable. (*Rooney*, supra, White, J., dissenting) A person may well not intend to relinquish all rights in personal property but nevertheless take action rendering his intent ineffective for Fourth Amendment purposes. The act of placing garbage for collection is an act of abandonment.

The distinction California attempts to draw between abandonment to the trashman or to the public is not supportable under the Fourth Amendment. At bar it was in fact the trashman who picked up the trash and turned it over to the police. Thus seizure of the garbage bags from the trash collector was no meaningful interference with respondents' possessory interests in the property (*Jacobsen*, supra, 466 US at 113) Respondents' possession was relinquished with no expectation of ever possessing the refuse again.

The decision by the California Court of Appeal is at odds with 21 years of decisions by this Court which hold that an individual's misplaced confidence that a person to whom he voluntarily confides his wrongdoing will not reveal it is not protected by the Fourth Amendment. (*Hoffa vs. United States*, 385 US 293 (1966); *Lewis vs. United States*, 385 US 206 (1966); *United States vs. White*, 401 US 745 (1971); to the same effect see also *People vs. Phillips*, 41 Cal.3d 29 (1985))

Every federal circuit court of appeals considering the issue has concluded that warrantless trash searches do not violate the Fourth Amendment (*United States vs. Mustone* (1st Cir. 1972) 469 F.2d 970; *United States vs. Terry* (2nd Cir. 1981) 702 F.2d 299, cert.den. 461 US 931; *United States vs. Reichert* (3rd Cir. 1981) 647 F.2d 397; *United States vs. Crowell* (4th Cir. 1978) 586 F.2d 1020, cert.den. 440 U.S. 959; *United States vs. Vahalik* (5th Cir. 1979) 606 F.2d 99 (cert.den. 606 U.S. 1081); *Magda vs. Benson* (6th Cir. 1976) 536 F.2d 111; *United States vs. Shelby* (7th Cir. 1978) 573 F.2d 971 (cert.den. 439 U.S. 841); *United States vs. Biondich* (8th Cir. 1981) 652 F.2d 743 (cert.den. 454 US 975); *United*

*States vs. Dela Espirella* (9th Cir. 1986) 781 F.2d 1432; *United States vs. O'Bryant* (11th Cir. 1985) 775 F.2d 1528.)

Recently in *Dela Espirella*, supra, the Ninth Circuit ruled on a warrantless trash search case from California:

As part of their investigation, federal agents searched trash containers placed for curbside collection outside Ronderos' home. The agents discovered various documents in the trash that were used to obtain a search warrant and were introduced into evidence at trial. Ronderos argues that the district court erred in not suppressing this evidence as obtained in violation of the fourth amendment.

We find this argument to be without merit. Warrantless searches of abandoned property do not violate the fourth amendment. The question, then becomes whether placing garbage for collection constitutes abandonment of the property. We join the other federal appellate circuits that have considered the matter and hold that it does. (781 F.2d at 1437.)

In *United States vs. Shelby*, supra, the court held: As we see the issue, it is whether or not the search of the trash constituted a violation of the defendant's reasonable expectation of privacy. *Katz vs. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is defendant's position that he had a reasonable expectation of privacy in his trash since he contemplated that it would be collected and disposed of by intermingling with other trash and eventually destroyed. Perhaps the defendant did in fact believe that the incriminating evidence of his crime so disposed of would go undetected. If defendant did, we view it only as additional bad judgment on his part. In the real world to so view the status of one's discarded trash is totally unrealistic, unreasonable, and in complete disregard of the mechanics of its disposal.

It therefore seems to be more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California.

The court found *Krivda* "is too unrealistic to be pursued." (573 F.2d at 974, cert.den. 439 U.S. 831.)

In *United States vs. Reichert* (3rd Cir. 1981) 647 F.2d 397, the Court stated:

Defendant claims that under *Katz vs. United States*, 389 U.S. 347, 88 S.Ct. 507, 19b L.Ed.2d 576 (1967), he had a reasonable expectation of privacy in the trash he placed in a public area to be picked up by trash collectors such that, when the police officers looked through the garbage and seized the methamphetamine, they violated the fourth amendment. A mere recitation of the contention carries with it its own refutation.

. . .

Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. If he had such an expectation, it was not reasonable. (647 F.2d at 399)

The majority of state courts considering the issue have likewise concluded that warrantless trash searches of garbage left out for collection are not violative of the Fourth Amendment. (see *People vs. Huddleston* (1976) 38 Ill. App.3d 277, 347 N.E. 2d 76; *Smith vs. State* (1973 Alaska) 510 P.2d 793; *State vs. Fassler* (1972 Arizona) 503 P.2d 807; *Crocker vs. State* (1970 Wyoming) 477 P.2d 122; *State vs. Purvis* (1968 Oregon) 438 P.2d 1002; *People vs. Whotte* (1982 Michigan) 317 N.W.2d 266; *State vs. Oquist* (1982



Minnesota) 327 N.W.2d 587; *State vs. Brown* (1984 Ohio) 484 N.E. 2d 215; *State vs. Stevens* (1985 Wis.) 367 N.W.2d 788; *State vs. Schultz* (1980 Fla.) 388 So.2d 1326.)

The California Court of Appeal found itself bound by the 4-3 decision by the California Supreme Court in *People vs. Krivda* (1971) 5 Cal.3d 357. There the Court held that a warrantless trash search violated defendants' reasonable expectation of privacy. In *Krivda* officers asked the refuse collectors to pick up trash barrels on the parkway in front of the residence, pour them into the empty well of the truck, and drive the trash down the street to the officers. The court found that the defendant had "expected privacy" because several cities have ordinances regulating trash pickup and an "additional element of expected privacy" which was violated because although the officers did not examine the contents until the trash had been placed in the well of the refuse truck, "at no time did defendants' trash lose its identity by being mixed and combined with the "conglomeration" of trash previously placed in the truck." (5 Cal.3d at 367.)

The dissent did not accept that the Constitution compels extension of protection to trash cans to those placed adjacent to or on a public thoroughfare, nor did it find "any constitutional compulsion for the newly developed doctrine of 'commingled trash'." (5 Cal.3d at 367-368, Wright., C.J., dissenting)

This Court granted certiorari, but being unable to determine whether *Krivda* had been decided on federal grounds, state grounds or both, this Court vacated and remanded for clarification. (409 U.S. 33.)

The California Supreme Court, on remand, responded it had relied on both federal and independent state grounds. (*People vs. Krivda* (1973) 8 Cal.3d 623.)

But, as the California Court of Appeal noted, in the case at bar:

Subsequent to *Krivda* and prior to the offenses charged here, California enacted Proposition 8 (Cal. Const., art I, Section 28, subd. (d)), and eliminated an accused's right to suppress evidence seized in violation of the California, but not the Federal Constitution. (See *In re Lance W.* (1985) 37 Cal.3d 873) [App to Pet for Cert. 13]

Thus the independent state ground that insulated *Krivda* from review by this Court 15 years ago is gone.

As the dissent in *Krivda* noted, trash ordinances protect the exclusive right of a city or its agent to collect trash. (5 C3d at 368) The notion that such ordinances establish an expectation of privacy has been rejected. (*United States vs. Dzialak*, supra, 441 F.2d 212; *United States vs. Vahalik*, supra, 606 F.2d 99.)

"We prefer the view adopted by every United States Court of Appeals to consider the issue, that the act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection because, "absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection."

. . .

The municipal ordinances cited by appellant does not alter the application of this rule in the instant case because there is no indication in the record that appel-



lant relied upon the ordinance to increase his expectation of privacy, or that he was even aware of the ordinance. The purpose of the ordinance was, presumably, sanitation and cleanliness, not privacy. (*Vahalik*, supra, 606 F.2d at 101, cert.den. 444 US 1081)

The decision in *Krivda* creating a doctrine of commingled conglomerations is unworkable and not supported by the constitution. Under that theory the 'search' is lawful only if the police allow enough similar garbage to surround the suspect's so that nothing of evidentiary value can be found. Thus, there is no way the officer can, in advance, know if his search is allowed. If the suspect's garbage is in a white bag the police in California must apparently find some more white bags before they search. If they mark an 'X' on everyone else's bag perhaps some additional mixing would be required by the California court.

No doubt respondents, like most lawbreakers, hoped they wouldn't be caught but that hope has been transmuted by the California court into an enforceable duty of the trash collector or police to affirmatively assist them in disposing of evidence of their wrongdoing. Neither trash ordinances nor the 4th Amendment require this result. Respondents had no reason to suspect that the trash collector or the police would condone their illegal activity or cooperate in concealment of the contraband.

Of *Krivda*, it may truly be said:

One may seriously and fairly question the strength of a juridical light that is discerned by so few and invisible to so many. [*People vs. Disbrow* (1976) 16 Cal.3d 101, dissenting opinion of Justice Richardson at 129.]

### **CONCLUSION**

For the foregoing reasons it is respectfully submitted the judgment of the California Court of Appeal, Fourth Appellate District should be reversed.

DATED: July 3, 1987

Respectfully submitted,

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(6)  
No. 86-684

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**

October Term, 1986

— o —  
THE STATE OF CALIFORNIA,

*Petitioner,*

vs.

BILLY GREENWOOD AND DYANNE VAN HOUTEN,

*Respondents.*

— o —  
On Writ of Certiorari To The  
Court of Appeal of California,  
Fourth Appellate District, Division Three

— o —  
**BRIEF FOR RESPONDENT DYANNE VAN HOUTEN**

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## QUESTIONS PRESENTED\*

Twice the California Supreme Court concluded that trash left at curbside is protected under the Fourth Amendment from the federal Constitution's proscription against unreasonable searches and seizures. Where police lacked probable cause or any reasonable suspicion Billy Greenwood had committed a crime, eschewed any attempts to obtain a search warrant, could point to no exemption to the warrant requirement, and yet repeatedly searched Billy Greenwood's trash, did the court of appeal err in concluding that the search and subsequent seizure violated Billy Greenwood's and Dyanne Van Houten's reasonable expectation of privacy? As a matter of public policy, should the Court conclude individuals have a right to expect that police will not conduct warrantless and unsupported excursions into their trash and that such expectations are both reasonable and legitimate? Should police be required to possess probable cause to believe an individual's trash left at curbside contains evidence of a crime before conducting a warrantless search?

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\*All parties to the proceeding in the California Court of Appeal, Fourth Appellate District are listed in the caption.

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No. 86-684

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**In The  
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October Term, 1988

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THE STATE OF CALIFORNIA,  
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vs.

BILLY GREENWOOD AND DYANNE VAN HOUTEN,  
*Respondents.*

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**On Writ of Certiorari To The  
Court of Appeal of California,  
Fourth Appellate District, Division Three**

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**BRIEF FOR RESPONDENT DYANNE VAN HOUTEN**

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**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

Fourth Amendment of the United States Constitution,  
tion,

The right of the people to be secure in their persons,  
houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Constitution Article 1, § 28, subdivision (d),

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. . . .

—o—

### **STATEMENT OF THE CASE**

In a complaint filed July 30, 1984, respondent Dyanne Van Houten was alternatively charged by the Orange County District Attorney with simple possession of cocaine and possession of cocaine for purposes of sale.<sup>1</sup> R. 1.<sup>2</sup> A preliminary examination was conducted before a magistrate on October 2, 3 and 4, 1984. R. 7-249. Concurrent with the preliminary examination the magistrate heard respondent's joint motion to suppress evidence.<sup>3</sup>

---

<sup>1</sup>West Cal. Ann. Penal Code §§ 11350, 11351.

<sup>2</sup>The record is referenced to the clerk's transcript on appeal.

<sup>3</sup>West Cal. Ann. Penal Code § 1538.5 (1982) provided that, "[a] defendant may move for return of property or to suppress as evidence against him any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: (1) The search or seizure without a warrant was unreasonable. (2) The search or seizure with a warrant was unreasonable because . . . . (f) [i]f the property or evidence relates to a felony offense initiated by complaint, the motion

(Continued on following page)

The sole evidence admitted against respondents was the product of a search warrant served on respondent Greenwood's residence. At the preliminary examination, Jenny Stracner testified she was a narcotics investigator for the City of Laguna Beach. R. 129. In February based upon information received from an anonymous informant, she began a practice of monitoring the trash at Billy Greenwood's residence. R. 113. She would ask the trash collectors to pick up the trash at Greenwood's residence, keep it separate from all other trash in the truck, and bring it down the street where she would wait. R. 129.

The trash was brought in a segregated area of the trash truck in a dark trash bag tied at the top. R. 102. There was no evidence any contraband or contents could be seen without opening the bag. Inside the bags officer Stracner found items she believed indicated drug use: bindles with residue, straws with residue, and baggies with residue. R. 91.

Based upon these findings, she sought and obtained a search warrant for 1575 Fayette, Laguna Beach. J.A. 27. On April 6, 1984, she and other police officers executed the search warrant on the house.<sup>4</sup> J.A. 43.

During the search of respondent Greenwood's house, officer Richard Seapin went upstairs to search additional

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(Continued from previous page)

may be made in the municipal or justice court at the preliminary examination."

Effective January 1, 1987, the procedures contained in subdivision (f) were radically modified but do not affect the present proceedings.

<sup>4</sup>There was a subsequent search based upon a second search warrant. However, only the first search involved Ms. Van Houten.



rooms. R. 160. On the floor he observed a purse. Officer Seapin opened the purse and looked inside seeing a sheet of magazine, crumpled up. R. 161. Seapin removed the paper from the purse, opened it and found white powder which he turned over to officer Stracner. R. 161-162.

The purse contained an identification card with Dyanne Van Houten's name and picture. R. 163. When officer Jimenez went downstairs with the purse and asked whose it was, Dyanne Van Houten claimed it. R. 175. Van Houten was then arrested. R. 70. The white powder was determined to be cocaine. R. 61.

The magistrate denied Van Houten's motion to suppress evidence and held her to answer solely upon the possession charge. J.A. 9. Nine days later petitioner filed an information charging the identical criminal counts as alleged in the complaint.<sup>5</sup> J.A. 10. On February 1, 1985, a motion to dismiss was heard in the superior court based upon the magistrate's denial of the motion to suppress evidence.<sup>6</sup> The motion to set aside the information was granted and the charges were dismissed. J.A. 75.

---

<sup>5</sup>West Cal. Ann. Penal Code § 739 (1985) permits the filing of an information based upon the evidence presented to the magistrate notwithstanding the magistrate's order discharging a defendant on a selected count. A defendant's remedy is to seek to set aside the count(s) charged in this manner. West Cal. Ann. Penal Code § 995 (1985).

<sup>6</sup>West Cal. Ann. Penal Code § 995, subdivision (a)(2) (1985) provides, "[s]ubject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases: [¶] If it is an information: (A) That before the filing thereof the defendant had not been legally committed by a magistrate. (B) That the defendant had been committed without reasonable or probable cause."

Petitioner appealed to the Fourth District Court of Appeal, Division Three. In a published opinion, *People v. Greenwood*, 182 Cal. App. 3d 729, 227 Cal.Rptr. 539 (1986), the court concluded that *People v. Krivda*, 5 Cal. 3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971), (*Krivda I*) cert. grtd. and remanded *California v. Krivda*, 409 U.S. 33 (1972), and *People v. Krivda*, 8 Cal. 3d 623, 105 Cal.Rptr. 521, 504 P.2d 457 (1973) (*Krivda II*), cert. den., *California v. Krivda*, 412 U.S. 919 (1973), compelled suppression of evidence obtained from a warrantless, non-exigent seizure of a trash bag and its contents. The California Supreme Court denied petitioner's application for review.

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## SUMMARY OF ARGUMENT

This Court has repeatedly,

“ ‘emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes,’ *United States v. Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by the judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967), footnotes omitted.

Unquestionably, when police, individually or through the employment of an agent, break the seal on a closed, opaque container to observe and seize its contents, both a search and seizure occurs within the meaning of the Fourth Amendment. As Justice Stevens pointed out in *United States v. Jacobsen*, 466 U.S. 109, 114 (1984),

“[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.”

The issue before the Court is to what extent Billy Greenwood possessed and is permitted to possess a reasonable and legitimate expectation of privacy in the closed, opaque container he left for the garbage man to transport to a county owned and operated landfill for disposal. If his expectation of privacy receives the Court's stamp of approval, then the warrantless and unsupported search and seizure of the bag and its contents was unreasonable and subject to suppression. If not, its contents, and the road maps of all citizens it contains will be forever open to the capricious actions of the police and our various governmental agencies, restrained only by the size of their budgets, their sense of morality and the degree of their curiosity.<sup>7</sup>

Privacy in a free society is perhaps the cornerstone of what separates Americans from those totalitarian states we collectively abhor. As Walter Crenkite commented in his introduction to George Orwell's 1983 edition of *1984*,

“*1984* is an anguished lament and a warning that we may not be strong enough or wise enough nor moral enough to cope with the kind of power we have learned to amass. That warning vibrates powerfully when we

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<sup>7</sup>A sign of this fear, whether real or imagined, invaded the decision of the Alaska Supreme Court when the court determined that under some circumstances police could conduct warrantless and unsupported trash searches. As the majority concluded, “we are unwilling to announce a general rule sanctioning official gathering and analysis of an individual's refuse.” *Smith v. State*, 510 P. 2d 793, 795 (Alas. 1973), cert. den. *Smith v. Alaska*, 414 U.S. 1086 (1973).

allow ourselves to sit still and think carefully about orbiting satellites that can read the license plates in a parking lot and computers that can tap into thousands of telephone calls and telex transmissions at once and other computers that can do our banking and purchasing, can watch the house and tell a monitoring station what television program we are watching and how many people there are in the room.”

No one questions that the refuse of our lives, whether labelled trash or garbage,<sup>8</sup> is the road map of our existence. Anthropologists daily explore the very trash heaps of societies long-ago made extinct utilizing their waste as a window into their sophistication, morality and daily rituals. As the California Supreme Court reiterated in *People v. Krivda*, *supra*, 5 Cal. 3d 357, 366,

“[w]e can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to ‘read’ the contents of another’s trash.” See also *People v. Edwards*, 71 Cal. 2d 1096, 1104, 80 Cal.Rptr. 633, 458 P.2d 713 (1969).

It is privacy, not the receptacle, which must be protected by this Court by acknowledging that society should

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<sup>8</sup>For purposes of analyzing whether “trash” is constitutionally protected, it is unfortunate the “package” is so labelled bringing with it the connotations associated with scavengers, rodents and bag ladies sifting through banana peels and used dinner napkins. Included within the bag are also letters from children at college divulging their indiscretions, our financial records, our discarded drug prescriptions and innermost family secrets.

expand rather than contract the available venues within which privacy in a crowded and electronically invaded nation may be protected. As Judge Motley so correctly pointed out,

“[t]he concept of privacy is paramount in deciding a claimant’s standing to invoke the protection of the Fourth Amendment. Courts should be hesitant to narrow that concept because, in this society, the sphere of personal privacy has become more and more confined. In a real sense, if courts begrudge the scope of the privacy expectations of the populace, not only will there be less freedom of the person, but his or her expectations of freedom will wither and with them the values of individuality and privacy from increasingly intrusive government control.” *United States v. Kahan*, 350 F. Supp. 784, 793-794 (S.D.N.Y. 1972), *aff’d* in part 415 U.S. 239 (1974).

Whether the Court analyzes the issue presented in terms of the law of property or the oft-referenced test interpreted by Justice Harlan in *Katz*, it still remains for this Court to make a value judgment regarding where a homeowner/citizen’s right to keep his life private ends and the government’s right to intrude begins.<sup>9</sup> It is not enough to say that if a citizen wants privacy in his refuse, he must do *something more* than merely locking it in a

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<sup>9</sup>Professor LaFave suggests in this treatise the analysis the Court engages in in most respects is a mere tautology; the Fourth Amendment protects those interests that may justifiably claim Fourth Amendment protection. 1 W. LaFave, *Search and Seizure* 2d § 2.1 (1978). In short, the Court engages in a weighing process pitting a determination of what deserves protection from government intrusion in addition to the degree of freedom lost (cost) versus the need for effective law enforcement (effect). To that extent, some compromise may be necessary to balance the interests of the citizen and the State. See Issue III, *ante*.



closed, opaque container.<sup>10</sup> *United States v. Terry*, *supra*, 702 F.2d 299, 309. As Chief Justice Burger pointed out, in general,

“[b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation of privacy that the *contents* would remain free from public examination.” *United States v. Chadwick*, 433 U.S. 1, 11 (1977), *emphasis added*.

Surely it is not the container or the means of closure which separates Billy Greenwood from Chadwick.

Our society, with ever-increasing density, electronic sophistication, justified paranoia and very real threats brought on by drugs and disease, still looks to the Constitution to protect the very liberties threatened by these developments and their cures. A momentary perusal of current literature demonstrates that the topic of drug testing in the work place and electronic eavesdropping offer both solutions to these problems and potential infringement of individual liberty. The issue the Court must now determine is whether the benefits of permitting wholesale

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<sup>10</sup>Courts have found various excuses for denying the obvious; closed, opaque containers *do not* expose their contents to the world. Thus *United States v. Biodich*, 652 F.2d 743, 745 (8th Cir. 1981); *United States v. Crowell*, 586 F.2d 1020, 1025 (9th Cir. 1978); and *United States v. Vahalik*, 606 F.2d 99, 101 (5th Cir. 1979) each predicated their respective decisions upon the failure of the defendant to make special arrangements with the garbage men (what could they have done?). Similarly *United States v. Terry*, 702 F.2d 299, 309 (2nd Cir. 1983) suggested a defendant shred or burn his trash or personally deliver refuse to a garbage grinding machine. Unfortunately, the thought of every citizen possessing a shredder large enough to consume a weekly household of trash, violating local ordinances by transporting their own trash or worse yet burning it (the Air Quality Maintenance District of Los Angeles and the Environmental Protection Agency notwithstanding) is no answer to privacy interests.

searches of our nation's trash are justified by the loss of those protections. Further, if law enforcement is to be permitted to search trash unencumbered by a search warrant, should some restraint be placed upon the exercise of that right?

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## ARGUMENT

### I

#### **THE MERE FACT AN INDIVIDUAL PLACES TRASH AT CURBSIDE FOR PICK-UP DOES NOT DETERMINE HIS REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT.**

*A. Property Law Concepts Are Irrelevant For Determining A Defendant's Reasonable And Legitimate Expectation Of Privacy.*

While a number of state courts and federal circuits have concluded that the only analysis necessary in determining whether a defendant has a legitimate expectation of privacy is to conclude garbage is abandoned property,<sup>11</sup>

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<sup>11</sup>*United States v. Dzialak*, 441 F.2d 212, 215 (2nd Cir. 1971); *United States v. Reicherter*, 647 F.2d 397, 399 (3rd Cir. 1981); *United States v. Minker*, 312 F.2d 632, 634-635 (3rd Cir. 1963); *United States v. Mustone*, 469 F.2d 970, 972 (5th Cir. 1972); *Magda v. Bensen*, 536 F.2d 111, 112 (6th Cir. 1976); *United States v. Shelby*, 573 F.2d 971, 973 (7th Cir. 1978); *United States v. Burnette*, 698 F.2d 1038, 1047 (9th Cir. 1983); *United States v. Dela Espriella*, 781 F.2d 1432, 1437 (9th Cir. 1986); *United States v. Crowell*, *supra*, 586 F.2d 1020, 1025; *United States v. Terry*, *supra*, 702 F.2d 299, 309; *People v. Huddleston*, 38 Ill. App. 3d 277, 347 N.E.2d 76, 80 (1976); *Smith v. State*, *supra*, 510 P.2d 793, 795; *State v. Brown*, 20 Ohio App. 3d 36, 484 N.E.2d 215, 218 (1984); *State v. Purvis*, 249 Or. 404, 438 P.2d 1002, 1005 (1968); *State v. Schultz*, 388 So.2d 1326, 1330 (Fla. App. 1980); *State v. Stevens*, 123 Wisc.2d 303, 367 N.W.2d 788 (1985).



property law concepts such as abandonment play little or no role in the privacy decision. Beginning with the Court's decision in *Katz v. United States*, *supra*, 389 U.S. 347 the Court made it clear that,

“the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations]. But, what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Id.*, at 351-352.

Although the Court had earlier suggested abandonment was sufficient to negate a reasonable expectation of privacy, *Abel v. United States*, 362 U.S. 217, 239 (1960), later in *Oliver v. United States*, 466 U.S. 170 (1984), the Court again rejected the notion that the touchstone of the Fourth Amendment is a defendant's property rights.

“The existence of a property right is but one element in determining whether expectations of privacy are legitimate. ‘“The premise that property interests control the right of Government to search and seize has been discredited.” ’ ’. *Id.* at 183.

For those very reasons the dissent in *California v. Rooney*, — U.S. —, 107 S.Ct. 2852, 2858-2859, 97 L.Ed. 2d 258 (1987) recognized that property interests do not control Fourth Amendment analysis, even where the property is garbage. See also *United States v. Dunn*, — U.S. —, 107 S.Ct. 1134, 94 L.Ed. 2d 326 (1987); *California v. Ciraolo*, 476 U.S. —, 106 S.Ct. 1809 90 L.Ed. 2d 210 (1986).

*B. The Use Of Property Law Concepts To Resolve Whether An Individual Has A Legitimate Expectation Of Privacy Fails To Account For Changes In Technology And Personal Values.*

It is far too simplistic to label as abandoned property an individual's decision to place his life's possessions in a pail or bag at curbside for collection and end the inquiry. This is because courts seem far too quick to define abandonment in property law terms; i.e., "the intention to [permanently] retain" an interest in the object. *United States v. Burnett, supra*, 698 U.S. 1038, 1047. If the Court were to adopt such a simplistic approach, the problems would be manifold.

Individuals permanently and without reservation provide numerous tangible and intangible items to third persons and yet retain and have a legitimate expectation of privacy in them once they leave their possession. Although this Court has sanctioned the warrantless use of pen registers, *Smith v. Maryland*, 442 U.S. 735 (1979), *Katz* sanctifies the words which leave our mouths and are conveyed to a third party (the telephone company) for transmission to a receiver.<sup>12</sup> Similarly, the Court has sanc-

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<sup>12</sup>The problems inherent in the Court's erosion of what is a legitimate expectation of privacy best come into play in *Katz*. When *Katz* was decided in 1967, few would have anticipated the widespread use of cordless telephones which permit home eavesdropping, intentionally or unintentionally, by neighbors and the police. Similarly, the advent of portable cellular telephones will soon open the door to Dick Tracy-like wrist telephones expanding the horizons of those interested in our conversations. Finally, telephone companies increasingly send our conversations and electronically transmitted documents via satellite, a form of transport open to interception by anyone with a twelve foot dish in their backyard. In short, as society becomes more sophisticated, privacy as defined by the Court becomes a scarcer commodity.

tioned a privacy interest in mail which every day is conveyed to both governmental and private entities for delivery to receivers. *United States v. Jacobsen, supra*, 466 U.S. 109; *United States v. Van Leeuwen*, 397 U.S. 249 (1970); *Ex Parte Jackson*, 96 U.S. 727 (1878).

It is for that very reason it is a mistake to attempt to draw a bright-line that all persons whose trash is left for collection lose a legitimate expectation of privacy based upon the property law concept of abandonment. This Court should reject a per se rule as was suggested by the Government recently in *United States v. Dunn, supra*, — U.S. —, 107 S.Ct. 1134, 1139, footnote 4, and the State of California herein. As the Court aptly pointed out when defining the concept of curtilage,

“[a]pplication of the Government’s ‘first fence rule’ might well lead to diminished Fourth Amendment protection in those cases where a structure lying outside a home’s enclosing fence was used for domestic activities.”

Similarly, a bright-line rule concluding all garbage left for collection is abandoned and thus outside the Fourth Amendment would diminish Constitutional protections where facts clearly indicate both a reasonably held and legitimate expectation of privacy.<sup>13</sup> The Court should reject abandonment as the touchstone of garbage searches.

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<sup>13</sup>Because *People v. Krivda, supra*, 8 Cal. 3d 623 compelled the court of appeal and the superior court to suppress the fruit of the trash search at issue here, no effort was made by either party to establish respondents’ reasonable expectation of privacy and society’s expectation trash left at curbside is protected.

*C. Although The Great Weight Of Authority Finds Garbage Searches To Fall Outside The Fourth Amendment, They Uniformly Err In Basing Their Conclusion Upon Abandonment Principles.*

As pointed out earlier at note 10, and repeatedly by petitioner and *amicus*, all federal circuits have concluded garbage left at curbside forfeits the depositor's reasonable expectation of privacy. But in all but a few of the decisions the result is a mere incantation of the apparent axiom; garbage is abandoned and abandoned property is unprotected by the Fourth Amendment.

It is this erroneous and facile reasoning the Court must avoid in formulating a standard by which to judge such searches. For although it *appears* that the weight of authority finds garbage searches to be outside the Fourth Amendment, such decisions were *uniformly* premised upon erroneous property law concepts condemned and discarded by this Court.

## II

### **THE WARRANTLESS AND UNSUPPORTED SEARCH OF BILLY GREENWOOD'S GARBAGE VIOLATED DYANNE VAN HOUTEN'S REASONABLE AND LEGITIMATE EXPECTATION OF PRIVACY MANDATING SUPPRESSION OF THE FRUITS OF THAT SEARCH.**

*A. Billy Greenwood's Decision To Place His Trash At Curbside For Collection Met The Subjectivity Component Of Katz v. United States.*

*Katz v. United States, supra*, imposes a two-part test for determining the protection afforded by the Fourth

Amendment. Justice Harlan, in interpreting the majority opinion defined the test as,

“first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ ” *Id.*, at 361, (Harlan, J. concurring).

No court has defined what the subjective component in *Katz* is but rather have discussed it solely within the context of the specific facts of each case. Whether it refers to a defendant’s *actual* expectation of privacy or whether the court looks to the facts to determine whether the dweller *exhibited* an expectation of privacy,<sup>14</sup> the facts here point to an expectation of privacy by Billy Greenwood.<sup>15</sup> Stronger than in *Rooney* where the dissent “assumed [ ] under state law [Rooney] retained an ownership or possessory interest in the trash bag and its contents,”<sup>16</sup> the trash bag here was in an individual bag, de-

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<sup>14</sup>See Note, 60 N.Y.U.L. Rev. 725, 743-744 (1985).

<sup>15</sup>Petitioner no longer argues respondent Van Houten lacked standing to object to the search of Greenwood’s residence or trash and thus has waived the issue before the Court. Rules of the U.S. Supreme Court, Rule 21.

<sup>16</sup>*California v. Rooney, supra*, — U.S. —, —, 107 S.Ct. 2852, 2858, 97 L.Ed.2d 258 (White, dissenting). Under *In re Lance W.*, 37 Cal.3d 873 (1985) the California Supreme Court concluded Article I, § 28, subdivision (d) of the California Constitution merely eliminated from independent state grounds the judicial remedy of suppression where a protected interest came in conflict with a decision of this Court. Thus, *Krivda’s* conclusion trash left at curbside is protected under the California equivalent of the Fourth Amendment still controls the privacy interest exhibited by defendant. See *Amicus Los Angeles Public Defender*.



posited in an individual homeowner's trash pail for which only Billy Greenwood had an interest.<sup>17</sup>

As to the first portion of the *Katz test*, even courts which have concluded the subjective expectation of privacy in trash is not reasonable (legitimate) have conceded that one may maintain such an expectation in garbage left for collection. In denying suppression of the fruits of a warrantless trash search, the Minnesota Supreme Court nevertheless conceded,

“a householder may ordinarily have some expectation of privacy in the items he places in his garbage can.” *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982).

As to courts which reject any such possibility, their reasoning, like those decisions which without more found trash abandoned and unprotected, is both simplistic in their assumptions and flawed in their analysis. Thus, the court in *United States v. Terry, supra*, 702 F.2d 299, having noted the trash search involved a “green bag closed with a brown tape” left on the sidewalk, concluded without evidence,

“mere use of taped opaque containers as indicating an intent to retain a privacy interest . . . are obviously designed to assure tidiness in appearance rather than privacy.” *Id.*, at 309.

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<sup>17</sup>There is no evidence in the record, one way or the other, whether Greenwood personally or subjectively harbored an expectation of privacy. This is a consequence of respondents' and petitioner's reliance upon the absolute rule of *Krivda* which provided respondents with a reasonable and legitimate expectation of privacy as a matter of law.

Or as the court concluded in *United States v. Reichert*, *supra*, 647 F.2d 397, 399,

“it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects.”

Such assumptions, though perhaps indicative of the court's personal views, do injustice to an individual's right to “seek to preserve as private” his possessions and beliefs.<sup>18</sup>

Here, all the Court knows is that Billy Greenwood, to exhibit an expectation of privacy did everything short of placing a label on the container or bag, or placing a sign on his lawn, strictly prohibiting garbage men or scavengers from opening the containers. The bags were opaque and sealed at the top, leaving nothing visible to the onlooker. Nothing suggested an intention to do anything more than convey the item to the garbage man for one purpose: for transportation to a hole in the ground where a bulldozer would bury it for antiquity.<sup>19</sup> If a home owner may have an expectation of privacy in his trash left at curbside, Billy Greenwood did everything necessary to manifest his intent that the contents of the bag remain private.

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<sup>18</sup>The Court made a similar assumption in doubting that “people in general entertain any actual expectation of privacy in the numbers they dial.” *Smith v. Maryland*, *supra*, 442 U.S. 735, 742. The difficulty confronting individuals in determining what the Fourth Amendment protects is the apparent need to determine what society is willing to or believes should be protected, a form of “constitutional rights” by opinion poll.

<sup>19</sup>If there is any doubt as to respondent's subjective expectation of privacy, he should be permitted on remand to make the requisite showing.



*B. Possession Of An Expectation Of Privacy In Garbage Left For Collection Is Both Reasonable And Legitimate.*

The societal necessity of turning over refuse to garbage collectors for disposal is not one merely engaged in out of volunteerism or a higher moral sense of ecology. In Orange County, California, and particularly in Laguna Beach where respondent Greenwood resided, the options of burying or burning refuse are equally unlawful. Orange County Municipal Code § 4-3-45, subdivision (a) commands that,

“solid waste created, produced, or accumulated in or about an apartment house, a dwelling house, or other place of human habitation shall be removed from the premises at least once each week.”

Further, any residential burning of trash is strictly banned in Orange County Municipal Code § 3-3-85. In sum, the act of delivering trash to third persons is compelled through use of a governmental, penal statute. If that is the case, the real question then should be whether in accomplishing that act the house dweller *exhibits* an expectation the contents *will not* be exposed to the eyes of the world. Placing the trash in a closed, opaque container does just that.

In concluding that Rooney failed to establish a legitimate expectation of privacy, the dissent argued two salient facts: trash is delivered to third parties and that it is foreseeable that police would search trash bags. Since

delivery to third persons is legally compelled, the real issue posed by the dissent is foreseeability.<sup>20</sup>

What the dissent meant by foreseeability is not entirely known. As is obvious, many actions of government may be foreseeable yet improper. The same reasoning would apply if police conducted daily check-points on the highways after supplying notice to the public in newspapers and magazines; yet the Court has held such spot checks violative of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979). Certainly Pacific Bell's warning to customers that their cellular telephone conversations may not be private does not, for Fourth Amendment purposes, diminish the expectation of privacy in the telephone call predicated upon *Katz*.

A home dweller's garbage deserves protection. *Oliver v. United States*, *supra*, 466 U.S. 170; 1 W. LaFave, Search

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<sup>20</sup>Although *Katz* appears to protect the sanctity of telephone conversations based upon society's belief such communications are due protection, under the *Rooney* dissent one must question the reasonableness of even telephone conversations when Pacific Bell now warns its customers in each billing that, "[i]t is a crime under state and federal law to eavesdrop on telephone conversations. Normally, you don't have to worry about the privacy of conversations you have on telephones located in your home or business. However, if you make calls using a cellular telephone or receive calls from people who do, you need to be aware that your conversations on these phones may not be entirely private . . . [¶] For this reason, the California Public Utilities Commission (CPUC) has asked that those placing calls on cellular telephones advise the people they are calling about the privacy issue at the beginning of each conversation. The CPUC also asked us to inform you that there are 'scrambling' devices for cellular phones . . . ." Presumably, the same warning should apply to cordless telephones widely utilized in residences and businesses.

and Seizure 2d 2.1(d) (1978). This Court has long recognized.

“ ‘the security of one’s privacy against arbitrary intrusion by the police’ is ‘at the core of the Fourth Amendment.’ E.g., *Berger v. New York*, 338 U.S. 41, 53; *Schmerber v. California*, 384 U.S. 757, 767; *Wolf v. Colorado*, 338 U.S. 25, 27 [overruled on another point in *Mapp v. Ohio*, *supra*, 367 U.S. 643].)” *People v. Edwards*, *supra*, 71 Cal 2d 1096, 1103.

It is this fundamental privacy interest which the Court must protect.<sup>21</sup> *People v. Whotte*, 113 Mich. App. 12, 317 N.W.2d 266, 269 (1982) (Burns, J. dissenting).

It is the denigration of privacy interests which is represented by those decisions which find an expectation of privacy illegitimate. Thus decisions such as *State v. Oquist*, *supra*, 327 N.W.2d 587 find no legitimate expectation of privacy absent any attempt at analyzing societal privacy needs. See also *United States v. Sumpter*, 669 F.2d 1215 (8th Cir. 1982). Similarly, decisions exemplified by *United States v. Biondich*, *supra*, 652 F.2d 743 premise the expectation of privacy issue on whether the defendant made “special arrangements with the garbage collector,” *id.*, at 745, or sought to burn, shred or bury the trash. *United States v. Terry*, *supra*, 702 F.2d 299; *United States v. Crowell*, *supra*, 586 F.2d 1020.

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<sup>21</sup>The Court noted in *United States v. Dunn*, *supra*, — U.S. —, 107 S.Ct. 1134, that the curtilage focus for Fourth Amendment purposes is upon “whether the area harbors the ‘intimate activity associated with the “sanctity of a man’s home and the privacies of life.”’ ” *Id.*, at 1139. Surely an individual’s refuse is at the core of everything man does; from what he reads (ideas) to what he writes (thoughts).

That is not to say the issue of the legitimacy of privacy in refuse hasn't been analyzed. Obviously thrice the California Supreme Court has examined the question and concluded that a householder has a legitimate expectation of privacy in trash left at curbside. *People v. Krivda*, *supra*, 5 Cal. 3d 357, (*Krivda I*) cert. grtd. and remanded *California v. Krivda*, *supra*, 409 U.S. 33, and *People v. Krivda*, *supra*, 8 Cal. 3d 623 (*Krivda II*), cert. den., *California v. Krivda*, *supra*, 412 U.S. 919; *People v. Edwards*, *supra*, 71 Cal. 2d 1096. In addition, the state of Hawaii and the Federal District Court, Southern District of New York supplemented by thoughtful dissents in Illinois,<sup>22</sup> Michigan,<sup>23</sup> Alaska,<sup>24</sup> Florida and Wisconsin support the proposition that privacy in a householder's trash should and must be protected.<sup>25</sup>

In *State v. Tanaka*, 701 P.2d 1274 (Hawaii 1985) the Hawaii Supreme Court found that not only did the defen-

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<sup>22</sup>*People v. Huddleston*, *supra*, 38 Ill.App. 3d 277, 347 N.E. 2d 76 (Stouder, J., dissenting).

<sup>23</sup>In *People v. Whotte*, *supra*, 317 N.W.2d 266, Michigan adopted the multiphasic test proposed by the Alaska Supreme Court in *Smith v. State*. See n. 24, *ante*. Justice Burns dissented arguing the rule adopted by the majority effectively infringed upon the fundamental privacy interests of the individual.

<sup>24</sup>*Smith v. State*, *supra*, 510 P.2d 793 (Rabinowitz, J. dissenting). The majority announced a four part test for determining the legitimacy of a house dweller's expectation of privacy (location of trash, numbers of residential units, who removed the trash, and where it was searched), but concluded *Smith* failed to meet the test.

<sup>25</sup>The Supreme Judicial Court of Maine in passing upon a trash search occurring after a barrel was removed from the defendant's garage concluded that placing the contraband in the barrel did not constitute an abandonment within the meaning of *Abel v. United States*, *supra*, 362 U.S. 217. *State v. Chapman*, 250 A.2d 203 (Sup.Jud.Ct.Me. 1969), overruled *State v. Johnson*, 413 A.2d 931 (1980).

dant have an "actual expectation of privacy [ ] by the placing of the item in an opaque, closed container," *id.*, at 1276, but that under the doctrine of independent state grounds Hawaii would recognize the legitimacy of that expectation. Similarly, Judge Motley in *United States v. Kahan, supra*, 350 F.Supp. 784 analogized the act of placing refuse in the hands of garbage men for transportation to a disposal site to both throwing the refuse into a shredder or more appropriately, handing a letter to a mail carrier. In both cases, what prevents government intrusion is not the shape or character of the container, but the expectation by society that placing the items contained therein in a closed container maintains the privacy the owner has reasonably come to expect.<sup>26</sup>

Judge Anstead, dissenting in *State v. Schultz, supra*, 388 So.2d 1326 observed,

"[i]n my view, a homeowner, upon placing items in a closed garbage container and placing the container in a position on his property where the container can be conveniently removed by authorized trash collectors, is entitled to reasonably expect that the container and the trash therein will be removed from his property only by those authorized to do so, and that such trash will be disposed of in a manner provided by ordinance or private contract. By sealing the containers in a secure manner and placing the containers on his own property, the owner has done everything within his own means to insure the privacy of the contents thereof, short of delivering the containers to a central disposal site himself." *Id.*, at 1330.

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<sup>26</sup>In a 4-3 decision of the Wisconsin Supreme Court, Justice Heffernan dissented noting that "all [the defendant] did [was] expose closed bags of garbage" rather than their contents to public scrutiny. *State v. Stevens, supra*, 123 Wisc.2d 303, 367 N.W.2d 788 (Heffernan, J., dissenting).



In disposing of the argument that trash is open to the prying eyes of anyone; be it man, woman or animal, who chooses to sift through the refuse, Judge Anstead chided,

“[w]hile it is true that one cannot reasonably expect trash containers to be completely safe from probing dogs . . . common sense tells us that one should be able to expect that his property and the trash containers will be free from search and seizure by the police, neighbors and others who are and should be more knowledgeable and respectful of the property and the privacy rights of others.” *IBID.*

In sum, contrary to petitioner's assertions, those courts which have sought to determine the legitimacy of a householder's expectation of privacy in trash containers are neither unanimous nor necessarily foolhardy. They merely recognize that in a society which is slowly losing its ability to retain its thoughts, ideas, fears, and concerns private from the world, the courts should collectively recognize that our garbage is merely a conduit for burying the products of our individual lives. As Justice Rabinowitz noted,

“a free and open society cannot exist without the right of the people to be immune from unreasonable interference by representatives of government. In order to preserve and protect this right of privacy, our Founding Fathers promulgated the fourth amendment to the United States Constitution. As the United States Supreme Court has repeatedly observed: [¶] The basic purpose of the Fourth Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” *Smith v. State, supra*, 510 P.2d at 799, footnote omitted.

Finding an expectation of privacy in a householder's trash to be both reasonable and legitimate is one means by which

this Court may protect we as individuals and as a society from inroads of government intrusion.

### III

#### **THE COURT MUST AT THE VERY LEAST ADOPT A RULE REQUIRING THE POLICE HAVE PROBABLE CAUSE PRIOR TO CONDUCTING WARRANTLESS SEARCHES OF TRASH LEFT AT CURBSIDE.**

*A. United States v. Ross Establishes A Middle Ground Where An Individual Has A Legitimate But Lowered Expectation Of Privacy.*

In *United States v. Ross*, 456 U.S. 798 (1982) the Court broke ground with a series of decisions which limited law enforcement's ability to conduct warrantless automobile searches. See gen. *Robbins v. California*, 453 U.S. 420 (1981); *United States v. Chadwick*, *supra*, 433 U.S. 1; *Arkansas v. Sanders*, 442 U.S. 753 (1979). In examining the right to search where police have legitimately stopped an automobile and possess probable cause to believe the auto contains contraband, Justice Stevens writing for the Court concluded that police,

"may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant. . . ." *Id.*, at 800.

The holding, considerably more expansive in the degree to which police could open closed containers found within automobiles, appeared to be based upon the belief individuals already possessed a lower expectation of privacy in automobiles than in their homes. Thus the Court relied on *Carroll v. United States*, 267 U.S. 132 (1925) and noted that,



“individuals always had been on notice that moveable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate’s prior evaluation of those facts.” *United States v. Ross*, *supra*, at 806, n. 8.

In sum, where an individual has a legitimate but lowered expectation of privacy in an object easily moveable, the Court has found a middle ground requiring police to be armed with probable cause but foregoing the requirement such cause first be tested by a neutral magistrate.<sup>27</sup>

*B. The Court Should Adopt A Rule Governing Trash Searches That Where An Individual Has Exhibited A Reasonable Expectation Of Privacy In Trash, Police May Conduct Warrantless Searches Only Upon Probable Cause.*

Admittedly trash left at curbside is, like an automobile, highly mobile. *Carroll v. United States*, *supra*. Assuming arguendo the Court is disinclined to provide full Fourth Amendment protection to a homeowner’s trash left at curbside, the Court should adopt a rule, similar to that in *Ross*, holding that where an individual has exhibited a reasonable expectation of privacy in trash left at curbside, police

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<sup>27</sup>In *South Dakota v. Opperman*, 428 U.S. 364, 367-368 (1976), the Court in examining warrantless inventory searches, concluded that an individual’s, “expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office.” This resulted from (1) the mobility of the vehicle and the individual’s reasonable expectations. However, rather than follow a number of lower courts which had either concluded inventory searches did not fall within the protection of the Fourth Amendment or were not searches at all, the Court found a middle ground concluding *warrantless* searches following a valid seizure were reasonable.

may conduct warrantless searches only upon probable cause. Such a rule would benefit both law enforcement with minimal societal cost while at the same time preserving an individual's reasonable and legitimate privacy interest.

Clearly, whatever the level or degree of privacy interest an individual has in trash left at curbside, it is not identical to that experienced in the home. This is based upon the fact that trash is open to scavengers (to whatever minimal degree in fact such behavior occurs) and is placed in the custody of third persons.<sup>28</sup> It is the lowered yet legitimate expectation of privacy which would be protected by imposition of the *Ross* rule with regard to trash searches.

The requirement that law enforcement be possessed with probable cause prior to searching an individual's trash protects society against arbitrary and capricious searches by law enforcement. While not tested by a neutral magistrate prior to a search, the search is ultimately tested and thus checked by a court of law when the government seeks to utilize the fruits of the search at trial. Law enforcement is not unduly hindered since society has long accepted the cost of police action which must be predi-

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<sup>28</sup>In the case of the use of the mail or telephone calls, individuals assume and perhaps must hope that others will respect their privacy. Nothing guarantees that the mailman will not violate the law and open the envelope or not break the law and merely peer through it. Similarly, all an individual may do is rely upon an implied covenant with private carriers they will not break the package and inspect the contents. Finally, party lines and inadvertent radio interception of telephone calls regularly occur, yet individuals expect that once interception occurs, the intervening party will hang up.

cated on more than hunch and rumor. *Illinois v. Gates*, 462 U.S. 213 (1983); *Terry v. Ohio*, 392 U.S. 1 (1968).

In conclusion, the concerns of society would be protected from improper and capricious police actions while at the same time insuring law enforcement's ability to obtain evidence of criminal actions without the necessity of a warrant and the fear evidence of a crime would evaporate. As the Hawaii Supreme Court convincingly noted,

“[p]eople reasonably believe that police will not indiscriminately rummage through their trash bags to discover their personal effects. Business records, bills, correspondence, magazines, tax records and other tell-tale refuse can reveal much about a person's activities, associations and beliefs . . . [This] type of police surveillance . . . should not go unregulated, for a society in which all our citizens 'trash cans could be made subject of police inspection' for evidence of more intimate aspects of their personal life upon nothing more than a whim is not 'free and open.' ” *State v. Tanaka*, *supra*, 701 P.2d 1274, 1277, citing *W. LaFave, Searches and Seizures* § 2.6(c) at 378 (1978).

*C. The Search Of Billy Greenwood's Trash Was Without Probable Cause Mandating The Quashing Of The Search Warrant For His Home.*

Whether the search of Billy Greenwood's trash were conducted under the authority of a judicially issued search warrant, a judicially recognized exigency or under the proposed *United States v. Ross* rule, the search was unlawful. Under any interpretation of the facts, officer Stracner conducted the initial searches of respondent's trash based upon hunch, conjecture and the unsupported and uncorroborated information of an informant.

As the Court noted in *Illinois v. Gates, supra*, 462 U.S. 213, 239, the probable cause formula boils down to making,

“a practical, common-sense decision, whether, given all the circumstances set forth in the [search warrant] affidavit before [the magistrate], including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”

Since the evidence before the Court establishes that officer Stracner acted solely upon an anonymous, untested tip and utilized the searches themselves to develop probable cause, the Court should find that the searches violated the Fourth Amendment and suppress the fruits discovered therein.

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### CONCLUSION

For the foregoing reasons the decision of the court of appeal should be affirmed.

Respectfully submitted,

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No. 85-694

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CLERK

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1987

THE STATE OF CALIFORNIA,

*Petitioner,*

v.

BILLY GREENWOOD AND DYANNE VAN HOUTEN,

*Respondents.*

On Writ Of Certiorari To The  
Court Of Appeal Of California,  
Fourth Appellate District, Division Three

BRIEF FOR RESPONDENT BILLY GREENWOOD

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**QUESTION PRESENTED**

Do warrantless searches of closed trash containers violate the Fourth and Fourteenth Amendments?



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## STATEMENT OF CASE

This case involves a series of warrantless controlled pickups of the trash, at the home of Respondent Greenwood. On various occasions between February and May, 1984, officers of the Laguna Beach Police Department waited until Respondent Greenwood placed his garbage at the street for collection; the officers made arrangements with the trash collector to put Greenwood's garbage aside, not to intermingle it with other collected trash, and to deliver said trash to the officers. (J.A. 4-5; 7-8). The trash had been placed out for collection, apparently on its regular pick up day, and was in dark plastic trash bags. There is no evidence that the trash could be seen through the dark plastic bags prior to the time they were opened. (J.A. 6; 32-33; 40-41). It appears that Respondent Greenwood's trash had been monitored between February and April of 1984. (C.T. 112-113.)

Search warrants were issued on April 6, 1984, and May 6, 1984, based in large part on the fruits of the trash searches.

## SUMMARY OF ARGUMENT

Two search warrants were issued for Respondent Greenwood's residence based in large part on a series of controlled trash pick ups and subsequent searches of Respondent's trash. The trash searches were conducted without warrants and without any claim of exigency. (C.T. 82)

Respondent respectfully contends that the trash searches were invalid and violated Respondent's reasonable expectation of privacy under the Fourth and Fourteenth Amendment to the United States Constitution.

Respondent Greenwood further contends that his expectation of privacy must be considered legitimate and

reasonable within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution because of the impact of state law establishing a right of privacy as to trash placed out for collection.

### ARGUMENT

#### **CONTROLLED TRASH PICK-UP, ACCOMPLISHED WITHOUT BENEFIT OF A WARRANT OR PROBABLE CAUSE, VIOLATED RESPONDENT'S REASONABLE EXPECTATION OF PRIVACY.**

In order to properly address the issues presented by this case, it is first necessary to properly define the precise question posed by the proposition herein advanced by Petitioner and Amici Curiae. For the issue herein is not merely that of whether or not a criminal suspect's trash may be searched; the issue more accurately defined is that whether or not any citizen's garbage, contained in opaque plastic garbage bags (J.A.<sup>1</sup> 6), may be seized by law enforcement officials and searched without a search warrant, without probable cause, and without any claim of exigency.

Petitioner, as well as amici curiae, contend that such police conduct is valid, not because it is in some sense necessary to the preservation of a well-ordered society, but because trash is to be viewed as "abandoned" property, deserving of no Fourth Amendment protection whatsoever.

The serious Constitutional infirmity inherent in the police conduct involved in this case, and in the argument of Petitioner and Amici Curiae, lies in its misdirected focus on the nature of the trash itself, rather than the privacy interests of the citizen whose trash is involved,

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<sup>1</sup> J.A. refers to Joint Appendix.

and the reasonable expectations of a citizen who places his garbage out for collection in opaque closed containers. As noted by Justice White in his recent dissenting opinion in *California v. Rooney* 483 U.S. —, 107 S.Ct. 2852, 2859 (1987):

The primary object of the Fourth Amendment is to protect privacy, not property, and the question in this case, as the Court of Appeal recognized, is not whether Rooney had abandoned his interest in the property sense, but whether he obtained a subjective expectation of privacy in his trash bag that society accepts as objectively reasonable.

And in the dissenting opinion in *Rooney*, the revealing nature of garbage was specifically noted. *California v. Rooney, supra*, at 483 U.S. —, n.3; indeed, an entire lifestyle can be well-determined from an examination of a citizen's trash. See, Rathje, "Archeological Ethnography. . . . Because Sometimes It Is Better To Give Than To Receive," in *Explorations in Ethnoarchaeology*, 49 (R. Gould ed. 1978). Certainly, a periodic examination of a person's eating preferences, drinking habits, literary interests, political associations, and occasionally, private thoughts, can be revealed by an examination of his trash.

Further, the magnitude of the invasion of privacy involved in controlled trash pick-ups is evident in the present case. For Petitioner herein seeks to justify not just a one-time examination of discarded refuse, but a periodic and perhaps systematic *monitoring* of that trash, that may have involved numerous seizures over a two month period. (See, J.A. 20; 54-55; C.T.<sup>2</sup> 150-151; see 112-113) Petitioners seek to justify this monitoring in the

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<sup>2</sup> C.T. refers to clerk's transcript.



absence of a search warrant, probable cause, or any claim of exigency.

Were this Court to adopt, for the first time, the proposition advanced by Petitioner, the Court would thereby authorize the uncontrolled systematic monitoring by the Government of citizens' lifestyles and attitudes. Such an approach cannot rationally be harmonized with accepted Fourth Amendment principles.

To allow the Government an unfettered and free rein to monitor the activities of private citizens, without the intervention of a neutral and detached magistrate, clearly violates the Fourth Amendment's warrant requirement. As noted in the case of *Steagald v. United States*, 451 U.S. 204, 212 (1981):

The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. As we have often explained, the placement of this check point between the Government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, *supra*, at 14, 92 L.Ed. 436, 68 S.Ct. 367, may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interest in protecting his own liberty and the privacy of his home. *Coolidge v. New Hampshire*, *supra*, at 449-451, 29 L.Ed.2d 564, 91 S.Ct. 2022; *McDonald v. United States*, 335 U.S. 451, 455-456, 93 L.Ed. 153, 69 S.Ct. 191 (1948)

Petitioner, however, would have this court hold inapplicable these constitutionally compelled principles, by defining the nature of the property involved to be such that it is deserving of no constitutional protection what-

ever. This analysis misdirects the focus to the property, rather than the privacy interest involved.

As stated in the majority opinion in *California v. Cir-aolo*, 476 U.S. —, —, 106 S.Ct. 1809, — (1986):

The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), (Harlan, J., concurring). *Katz* posits a two part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See *Smith v. Maryland*, 442 U.S. 735, 740, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979).

In the present case, as noted in more detail, *infra*, Respondent exhibited an expectation of privacy; that expectation, contrary to the argument of Petitioner and Amici Curiae, is one which society ought properly to recognize, and protect.

Authorities dealing with this issue are not in agreement.

Petitioner and Amici Curiae cite a plethora of Federal Circuit Court decisions holding that there is no reasonable expectation of privacy in garbage which has been set out for collection. (*United States v. Mustone* (1st Cir. 1972) 469 F.2d 970; *United States v. Terry* (2nd Cir. 1981) 702 F.2d 299, cert. den. 461 U.S. 931; *United States v. Reichert* (3rd Cir. 1981) 647 F.2d 397; *United States v. Crowell* (4th Cir. 1978) 586 F.2d 1020, cert. den. 440 U.S. 959; *United States v. Vahalik* (5th Cir. 1979) 606 F.2d 99 (cert. den. 606 U.S. 1081); *Magda v. Benson* (6th Cir. 1976) 536 F.2d 111; *United States v. Shelby* (7th Cir. 1978) 573 F.2d 971 (cert. den. 439 U.S. 975); *United States v.*

*Dela Espirella* (9th Cir. 1986) 781 F.2d 1432; *United States v. O'Bryant* (11th Cir. 1985) 775 F.2d 1528.)

But these decisions, as well as those of the state courts upon which Petitioner relies, (see *People v. Huddleston* (1976) 38 Ill. App.3d 277, 347 N.E.2d 76; *Smith v. State* (1973 Alaska) 510 P.2d 793; *State v. Fassler* (1972 Arizona) 503 P.2d 807; *Crocker v. State* (1970 Wyoming) 477 P.2d 122; *State v. Purvis* (1968 Oregon) 438 P.2d 1002; *People v. Whotte* (1982 Michigan) 317 N.W.2d 266; *State v. Oquist* (1982 Minnesota) 327 N.W.2d 587; *State v. Brown* (1984 Ohio) 484 N.2d 215; *State v. Stevens* (1985 Wis.) 367 N.W.2d 788; *State v. Schultz* (1980 Fla.) 388 So.2d 1326.) have almost uniformly defined the issue in terms of abandonment, without any extended analysis of the privacy issues involved.

By contrast, the California Supreme Court in the case of *People v. Edwards*, 71 Cal.2d 1096 (1969), analyzed the rationale for finding a reasonable expectation of privacy in refuse. In so holding a unanimous Court noted, *Id.* 71 Cal.2d at 1104:

We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to "read" the contents of another's trash.

Two years later, a divided California Supreme Court applied the *Edwards* principle in *People v. Krivda* 5 Cal.3d 357 (1971). In so holding, the Court noted, *Id.*, 5 Cal.3d at 366-367:

The placement of one's trash barrels into the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public. To the contrary, many municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated. (See, e.g., Los Angeles County Ord. No. 5860. ch. IX, §§ 1611-1622, 1681-1691.) Moreover, these ordinances commonly prohibit unauthorized persons from tampering with trash containers. (*Id.*, § 1710.) The provisions of these ordinances would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalk for collection.

Aside from municipal ordinances, there may exist an additional element of expected privacy whenever one consigns his property to the trash can, to be dumped, destroyed and forgotten. As stated in *Edwards*, "The marijuana itself was not visible without 'rummaging' in the receptacle. So far as appears defendants alone resided at the house. In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case. We can readily ascribe many reasons why residents would not want their castaway clothing, letter, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, *at least not until the trash had lost its identity and meaning of becoming part of a large conglomeration of trash elsewhere*. Half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." (Italics added; *People v. Edwards*, *supra*, 7 Cal.2d 1096, 1104.)

Similarly, in the instant case the contraband was concealed in paper sacks within the barrels, and was not visible without emptying or searching through the barrels' content. The fact that the officers did not examine the contents until the trash had been placed

into the well of the refuse truck does not distinguish *Edwards*, for at no time did defendants' trash lose its "identity" by being mixed and combined with the "conglomeration" of trash previously placed in the truck. Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked up by police officers acting without a search warrant.

Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children may rummage through ones trash barrels and remove some of its contents. However, as stated in *People v. McGrew*, 1 Ca.3d 404, 412 [82 Cal.Rptr. 473, 462, P.2d 1], "The hotel guest may reasonably expect a maid to enter his room to clean up, but absent unusual circumstances he should not be held to expect that a hotel clerk will lead the police on a search of his room."

And the analysis of the majority in *Krivda* was recently followed in Hawaii, in the case of *People v. Tanaka*, 701 P.2d 1274 (1985). Noting that the various Federal Circuit Courts had held otherwise, the Supreme Court of Hawaii construed its own Constitution to preclude warrantless trash searches. In so holding, the court observed, *Id.*, 701 P.2d at 1276-1277:

In light of the facts in these cases, we believe defendants' expectations of privacy are ones society is prepared to recognize. People reasonable believe that police will not indiscriminately rummage through their trash bags to discover their personal effect. Business records, bills correspondence, magazines, tax records and other telltale refuse can reveal much about a person's activities, associations, and beliefs. If we were to hold otherwise, police could search everyone's trash bags on their property without any reason and thereby learn of their activities,



associations, and beliefs. It is exactly this type of overbroad governmental intrusion that Article I, § 7 of the constitution compels us to agree with Professor LaFave when he said:

[this] type of police surveillance . . . should not go unregulated, for a society in which all "our citizens" trash cans could be made the subject of police inspection" for evidence of the more intimate aspects of their personal life upon nothing more than a whim is not "free and open."

LaFave, *Searches and Seizures* § 2.6(c) at 378 (1978) (footnote omitted) (quoting *People v. Krivda*, 5 Cal.3d 357, 367, 468 P.2d 1262, 1269, 96 Cal. Rptr. 62, 69 (1971)).

## II.

The fact that we hold the defendants have reasonable expectation of privacy in their trash bags does not mean that the police were powerless to search defendant's trash bags. It simply means that absent exigent circumstances, the police will have to have a search warrant based on the probable cause. *State v. Dias*, 62 Haw. 52, 56, 609 P.2d 637, 640 (1980).

To equate placing one's trash out for collection with abandonment, moreover, is unreasonable. As observed in LaFave, "Search and Seizure, A Treatise on the Fourth Amendment," 2nd ed. 1987, § 2.6(c), p. 477:

Though the court in *Edwards* implied that defendant had not really abandoned the items in the trash cans, the more significant part of the holding is that which recognizes there can be a justified expectation of privacy in garbage. It does seem clear that Edwards had abandoned the objects he placed in his trash cans; unlike the defendant in *Work*, he demonstrated an unequivocal intent to part with them forever. But this is not determinative. A justified expectation of privacy may exist as to items which have



been abandoned in the property law sense, just as it is true that no such expectation may exist on some occasions even though the property has been abandoned. (Fn. omitted.)

In the present case, Petitioner factually exhibited an expectation of privacy. His trash was placed out for collection on the day of expected regular pick up. (J.A. 32) the trash was contained in apparently opaque plastic garbage bags. (J.A. 6, C.T. 101-102) Respondent's reasonable expectation was that the trash collector would pick up the bags shortly after they had been deposited for collection, and would intermingle the items with other trash, and would thereafter deposit mixed trash at an appropriate dump site. Members of the general public would not be able to see into the dark plastic bags; the bags would not be on the street long enough to make likely its inspection by anyone.

It is at this point, however, that governmental conduct intervened; for the officers herein waylaid the opaque containers, by instructing the trash collector to keep Respondent's trash separate, to not comingle it with others' trash, and to deliver said trash to the officers. The nature of the governmental intervention in the trash collection process at this juncture is both revealing, and perhaps determinative, of the issues in this case.

For the fact that the officers had to act at that precise moment on the day of the trash collection underscores Respondent's reasonable expectations as to what would occur with respect to his trash once it was placed out for collection. It was to be picked up shortly thereafter, and taken to the dump. Illustrative is the fact that, on one of the occasions, the collector had not maintained several of the bags separate from other trash, and Petitioner's trash became irretrievable. (C.T. 147-149, J.A. 8.)

Equally as important, the timing and details of the government's intervention with the collection process serves particularly to define the relationship of Respondent, the trash collector, and the government. In placing his trash out for collection, Respondent entrusted the collector with a duty he could well have done for himself. That he entrusted this task to the trash collector, and consented to (and inferrably paid for) the trash collector to take the bags for the purpose of depositing them at the dump cannot be equated with a consent that the collector give the bags to the police instead.

It is in this context that Petitioner seeks to have this Court apply the rationale of Federal Circuit Court decisions holding that, because trash collectors or scavengers might be able to examine a person's trash, it should be viewed as not entitled to Fourth Amendment protection. (e.g., *United States v. Shelby, supra*; *United States v. Terry, supra*.)

Further support for this proposition is found in the dissenting opinion of Justice White in *California v. Rooney, supra*, 483 U.S. at:

Respondent knowingly exposed his betting papers to the public by depositing them in a trash bin which was accessible to the public. Once they were in the bin, he no longer exercised control over them. While he may not have welcomed intrusions, respondent did nothing to ensure that his refuse would not be discovered and appropriate. Indeed, he placed his papers in the bin for the express purpose of conveying them to third parties, the trash collectors, whom he had no reasonable expectation would not cooperate with the police.

\* \* \*

Any distinction between the examination of trash by trash collectors and scavengers on the one hand

and police on the other is untenable. If property is exposed to the general public, it is exposed in equal measure to the police. It is clear from *Ciraolo* that the Fourth Amendment does not require the police to avert their eyes from evidence of criminal activity that any member of the public would have observed, even if a casual observer would not likely have realized that the object indicated criminal activity or would not likely have notified the police even if he or she had realized the object's significance. It may of course be true that a person minds an examination by the police more than an examination of an animal, child, a neighbor, a scavenger, or a trash collector, but that does not render the intrusion by the police illegitimate.

This concept is closely related to the proposition that, if a citizen wishes to maintain the privacy of his refuse, he should dispose of it on his own, either by incinerating it himself, or by shredding or grinding it. (*United States v. Shelby, supra; United States v. Terry, supra.*)

It is respectfully submitted that the analysis evident in those cases cannot properly be applied.

First, the record in the present case does not support such an application; however open to general public inspection trash placed in a communal trash bin may be, the same cannot be said of opaque trash bags placed outside of a single family residence shortly before its expected collection and disposal.

Second, the analysis evident in those cases is, it is respectfully submitted, circuitous; it assumes the premise that there is no expectation of privacy, and tends to equate an effective right of privacy with the question of who owns the most efficient incinerator or paper shredder. The realities of modern life in this country are otherwise. Millions of Americans place their trash out for

collection on the appropriate day, expecting that the personal secrets contained therein will be forever buried at the local dump. They have neither time, nor the money, to handle their own waste disposal.

Third, the remote possibility, on the facts of this case, that scavengers or animals may have had access to Respondent's trash in that short interval after it was placed for collection, and prior to its actual collection, adds little to this analysis. For that remote possibility serves only to demonstrate that Respondent's expectation of privacy, while reasonable, may not have been absolutely certain. The lack of absolute certainty in privacy expectations, however, does not support a finding that the privacy expectation was unreasonable. As observed by Justice Scalia in his concurring opinion in *O'Connor v. Ortega*, 480 U.S. \_\_\_, \_\_\_, 107 S.Ct. 1492, 1505 (1987):

It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and, indeed, even though his landlord has the right to conduct unannounced inspections at any time. Similarly, in my view, one's personal office is constitutionally protected against warrantless intrusions by the police, even though the employer and co-workers are not excluded.

Further, virtually no diminution of an expectation of privacy can properly be inferred from the fact that Respondent entrusted his trash to a collector who might thereafter have cooperated with the police. Some support for a diminution in the expectation of privacy can be found in the dissenting opinion of Justice White in *California v. Rooney*, *supra*, 483 U.S. at \_\_\_, and see *U.S. v. Shelby*, *supra*; *U.S. v. Crowell*, *supra*; *U.S. v. Terry*, *supra*. The analysis in these cases might properly apply if the trash

collector had, on his own initiative, searched Respondent's trash, and delivered incriminating results to the police. Under such circumstances, the trash collector's search would involve no state action, and would not involve Fourth Amendment considerations. But even this analysis would apply only if the trash collector was not acting as an agent of any governmental official. As observed by Justice Stevens in his opinion in *United States v. Jacobsen* 466 U.S. 109, 113-114 (1984):

This Court has also consistently construed his protection as proscribing only governmental action; it is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Walter v. United States*, 447 U.S. 649d, 662, 65 L.Ed.2d 410, 100 S.Ct. 2395 (1980) (Blackmun, J., dissenting). (Fn. omitted.)

In the present case, no private search occurred in fact. The trash collector clearly acted at the request of the police. Moreover, even if the rationale of a private search were applied, the government's utilization of the seized materials could not properly exceed the scope of the private search. *United States v. Jacobsen, supra*, 466 U.S. at 115; *Walter v. United States*, 447 U.S. 649, 657 (1980). Applied to the facts of the present case, the private party, i.e., the trash collector, conducted no search. Any governmental search would be within the ambit of the Fourth Amendment.

More apt in this context is this Court's holding in *Stoner v. California*, 376 U.S. 483 (1964), where in this Court held that while a motel guest implicitly consents to entry into his room in the performance of their janitorial duties, he does not consent to their authorization for a police



search. In so holding this Court observed, *Id.*, 376 U.S. at 489-490:

It is true, as was said in *Jeffers*, that when a person engaged a hotel room he undoubtedly gives "implied or express permission" to "such persons as maids, janitors or repairmen" to enter his room "in the performance of their duties." 342 U.S. at 51, 96 L.Ed. at 64. But the conduct of the night clerk and the police in the present case was of an entirely different order. In a closely analogous situation the Court has held that a search by police officers of a house occupied by a tenant invaded the tenant's constitutional right, even though the search was authorized by the owner of the house, who presumably had not only apparent but actual authority to enter the house for some purpose, such as to "view waste." *Chapman v. United States*, 365 US 610, 5 L.Ed.2d 828, 81 S.Ct. 776. The Court pointed out that the officer's purpose in entering was not to view waste but to search for distilling equipment, and concluded that to uphold such a search without a warrant would leave tenant's home secure only in the discretion of their landlords.

By parity of reasoning, when a citizen places his trash out for collection on the designated pick up day, he would reasonably expect that his refuse would be intermingled with other trash, and thereafter forever buried at the local dumpsite. It is quite unreasonable to assume that such a person expressly or impliedly gives consent to the trash collector to deliver his trash, intact or otherwise, to the police for inspection.

Finally, the reasonableness of Respondent's expectation of privacy must be seen in the context of applicable state law. For to the extent that notions of a reasonable expectation of privacy must rest in part on those expectations that society will accept as reasonable, the pronouncements of that society on the subject should not be



ignored. Were Respondent living in an area in which trash was by law made available for public inspection on a regular basis, no expectation of privacy could be considered reasonable.<sup>3</sup> However, in a State in which a citizen is held to have a reasonable expectation of privacy in his trash, which state laws will protect from governmental invasion, it would seem that Fourth Amendment analysis should recognize the citizen's expectation of privacy as reasonable.

California is such a state. California by constitutional provision,<sup>4</sup> protects a citizen's right to be free from unreasonable searches and seizures, which has been interpreted to prohibit the kind of governmental search which occurred in this case. *People v. Krivda* (1971) 5 Cal.3d 357. And California has a separate constitutional provision protecting a citizen's right to privacy which is declared to be an inalienable right. California Constitution, Article I § 1.<sup>5</sup> California's interpretation of those provisions is binding on this Court. See *Uphaus v. Wyman*, 364 U.S. 388, 389 (1960).

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<sup>3</sup> Assuming, of course, the validity of the state regulation. See, e.g., *New York v. Burger* 482 U.S., \_\_\_, (1987)

<sup>4</sup> California Constitution, Article I § 13, provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

<sup>5</sup> California Constitution, Article I § 1 provides:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Since the advent of Article I § 28(d), of the California Constitution, a California Court no longer has a state exclusionary rule to provide a remedy for violations of state laws, although Article I § 28(d) does not by its terms alter existing state law as to the validity of any search or seizure. *In re Lance W.* (1985) 37 Cal.3d 873, 886-887.

The question thus posed is that of whether or not a right of privacy, guaranteed by state law, is enforceable directly or indirectly under the Fourth and Fourteenth Amendment exclusionary rule. For several reasons, it is respectfully submitted that this question should be answered in the affirmative.

First, there is precedent for this Court's application of state law to determine the validity of a search or seizure for Fourth Amendment purposes.

Although in part commanded by act of Congress, this Court noted in the case of *U.S. v. Di Re*, 332 U.S. 581, 589 [68 S.Ct. 222, 226, 92 L.Ed.210] (1948):

We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeably to the usual mode or process against offenders in such state." There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.

(In accord, *Miller v. United States* 357 U.S. 310, 305, 2 L.Ed.2d 1332, 1336 78 S.Ct. 1190 (1958); *U.S. Watson*,

423 U.S. 411, 420 fn.8, 46 L.Ed.2d 598, 607 96 S.Ct. 820 (1976).)

Federal circuit decisions do not appear unanimous on this issue, and its resolution would appear to depend largely on the particular context involved. As noted in *U.S. v. McNulty* 729 F.2d 1243, 1251 (10th Cir. 1983):

We do not say that federal courts need never construe or apply state law. Where the circumstances dictate the propriety of applying state law, it will be recognized. An example of this *United States v. Dudek*, 530 F.2d at 690. The failure of Ohio police officers to file a timely report and a verified inventory was held (in *Dudek*) to not require vitiation of an otherwise validly executed search warrant issued under Ohio law. A dearth of federal law on the issue in question is one such constraint. *United States v. Re*, 332, U.S. 581, 589-91, 68 S.Ct. 222, 226-27, 92 L.Ed. 210 (1948). In that case, the Court ruled that state law governed the propriety of seizure of evidence of a federal crime by a state officer working with a federal officer, because there was insufficient federal law on the question of warrantless arrest. More to the point here, a relevant federal statute may prescribe reference to state law in certain instances. Cf. Fed.R.Evid. 501 (privilege in certain actions to be determined in accordance with state law). Thus a careful examination of title III. The federal wiretap statute, is necessary here. (Fn. omitted.)

(See also, *U.S. v. Mitchell*, 783 F.2d 971, 973-974 (10th Cir. 1963) holding Federal Law controlling: cf. *Mason v. United States* 719 F.2d 1485 (10th Cir. 1983) referring to state law; *U.S. v. Rickus*, 737 F.2d 360 (3rd cir. 1984), holding federal law controlling.)

And, in a series of cases dealing with wiretap evidence some courts have relied on state law, since the issue involved the basic right of privacy, particularly when state

officers act pursuant to a state warrant. As stated in *U.S. v. Manfredi*, 488 F.2d 588, 598 (2nd Cir. 1973):

In dealing with the question of the validity of the warrants themselves, clearly a question of state law, it will be recalled that the Crodelle affidavit submitted to the state court judge in support of the petition seeking the wiretap order contained an agreement "to limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations." (Fn. omitted.)

But this doctrine concededly is not without its limitation. As stated in *U.S. v. Jarabek*, 726 F.2d 889, 900 (1st Cir. 1984):

*Curreri* involved a state investigation with the use of wiretap equipment authorized by a state court order. Federal officials became involved only after the wiretapping was completed. The analysis in this case, upon which appellant's rely, must be read in the context of the court's observation that a stricter state statute regarding wiretap interception will be applied by a federal court only in the event electronic surveillance is conducted pursuant to a state court authorization. *Curreri* provides no support for appellant's claim.

We have found no federal case that has relied on state law in judging the admissibility of evidence of intercepted communications in any circumstances other than where the electronic surveillance was conducted pursuant to a warrant or order. On the other hand, a number of cases stand for the proposition that in federal criminal trials, regardless of any violation of state law, the admissibility of wiretap evidence always is a question of federal law. E.g., *United States v. Butera*, 677 F.2d 1376, 1380 (11th Cir. 1982), cert. denied, \_\_\_ U.S. \_\_\_ (1983); *United States v. Horton*, 601 F.2d 319 323 (7th Cir.) cert. denied, 444 U.S. 937 (1979); *United States v. Nelligan*, 573 F.2d.

251, 253 (5th Cir. 1978); *United States v. Shaffer*, 520 F.2d 1369, 1371-2 (3d Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1051 (1976). In the instant case it is not necessary for us to rest our decision upon this proposition, for here we have federal officers who performed their duties in a lawful manner in a joint investigation. The mere involvement of state officers is not sufficient reason to look to state law to determine the admissibility of interception evidence. (fn. omitted.)

(See also, *United States v. Henderson*, 721 F.2d 662, 664 (9th Cir. 1983); *United States v. Alexander*, 761 F.2d 1294, 1298, (9th Cir. 1985); *U.S. v. Kovac*, 795 F.2d 1509, 1511 (9th Cir. 1986); *United States v. Day*, 455 F.2d 454, 455 (3rd Cir. 1972); state law controlling; *United States v. Little*, 753 F.2d 1420 (9th Cir. 1984) federal law controls in federal proceedings.)

Second, to hold that the Fourth Amendment exclusionary rule applies to exclude evidence obtained in violation of a right of privacy guaranteed by a state constitution does not necessarily hold more than that the reasonableness of a citizen's expectation of privacy is determined in large measure by state law. Once it is determined that state law has declared an expectation of privacy to have been reasonable, the criteria for the application of the Fourth Amendment's exclusionary rule would appear to have been met. (See *California v. Ciraolo*, *supra*, 476 U.S. at \_\_\_\_; *Oliver v. United States* 466 U.S. 170, 177 (1984); *O'Connor v. Ortega*, *supra* 480 U.S. \_\_\_\_, \_\_\_\_.)

And on one final ground California's interpretation of its own constitutional right of privacy should control the disposition of this case. Even if this Honorable Court were to hold that, in the absence of state law considerations, the Fourth Amendment does not preclude trash searches such as those in the present case, it is re



spectfully submitted that this Court should hold that the Fourth Amendment, as applied to the states through the Fourteenth Amendment, compels application of the exclusionary rule for violations of at least fundamental state constitutional rights. In *Mapp v. Ohio*, 367 U.S. 643 (1961) this Honorable Court held the exclusionary rule was essential to the enforcement of the right of privacy, and without the rule, the right was rendered "a form of words" and illusory. This Court therein stated, *Id.*, 367 U.S. at 655-656:

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from the state invasions of privacy would be so ephemeral and so neatly severed from conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

\* \* \*

In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

For the foregoing reasons, this Court in *Mapp* held that the Due Process Clause of the Fourteenth Amendment



compels application of the exclusionary rule to searches by state officers.

The holding in *Mapp* cannot reasonably be limited to violations of rights recognized under federal, but not state law. For a state cannot, consistent with the Due Process Clause, create an "Inalienable" right of privacy, and thereafter render that right meaningless and unenforceable.

That the Due Process Clause applies to enforce rights which have their origin in state law, is now beyond dispute. This Court so held, in *Vitek v. Jones*, 455 U.S. 480, 488.

We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment. There is no "constitutional or inherent right" to parole, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 799 S.Ct. 2100, 2103, 60 L.Ed.2d 668 (1979), but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revoke parole. *Morrissey v. Brewer*, 408 U.S. 471, S.Ct. 2593, 33 L.Ed.2d 484 (1972). The same is true of the revocation of probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). In *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), we held that a state-created right to good-time-created right to good-time credits, which could be forfeited only for serious misbehavior, constituted a liberty interest protected by the Due Process Clause. We also noted that the same reasoning could justify extension of due process protections to a decision to impose "solitary" confinement because "[it] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a

major act of misconduct." *Id.*, at 571-572, n. 19, 94 S.Ct. at 2982, n. 19. Once a State has granted prisoners a liberty interest, we hold that due process protections are necessary "to insure that the state-created right is not arbitrarily abrogated." *Id.*, at 557 94. S.Ct. at 2975. (*Id.*, 445 U.S. at 488-489).

This principle was also recognized by Justice Rehnquist in his opinion in *Hewitt v. Helms*, 459 U.S. 460, 466, (1983).

While no State may "deprive any person of life, liberty, or property, without due process of law," it is well settled that only a limited range of interests fall within this provision. Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States. *Meachum v. Fano* 427, U.S. 215, 223-227, 96 S.Ct. 2532, 2537-2540, 49 L.Ed.2d 451 (1976).)

California has by its Constitution, and by its judicial interpretations thereof, recognized a citizen's right to privacy; it has recognized that the right to privacy precludes controlled trash seizures and searches such as those in the present case. Having created such a "personal liberty interest," the state cannot, consistent with the Due Process Clause of the Fourteenth Amendment, arbitrarily render that personal liberty interest a meaningless "form of words." (*Mapp v. Ohio*, *supra*, 367 U.S. at 655.)

Accordingly, the exclusionary rule of the Fourth and Fourteenth Amendments must be applied to exclude evidence seized in violation of personal liberty interests recognized by a state to be "inalienable." The privacy of one's refuse is so recognized in California.

### CONCLUSION

At issue herein is a basic right to privacy versus the simple requirement that California State Law Enforce-

ment Officers obtain a search warrant, at least in the absence at any exigency. There is no compelling need to dispense with the requirement of probable cause and a warrant in situations wherein no exigency exists.

To hold otherwise is to allow unfettered government monitoring of the most intimate details of the lives of citizens. To avoid such monitoring and surveillance, a citizen would have to either keep his refuse, or dispose of it by his own means. For the vast majority of our citizens, these alternatives are not feasible. But even more importantly, to hold valid such monitoring is to hold that, in order to maintain freedom from government snooping, a citizen must carefully screen and scrutinize that which leaves his residence. This would be an unwarranted and dangerous precedent, inconsistent with concepts of a free society. The same rationale could be utilized to authorize the monitoring of chimney emissions, plumbing, and other indicia of a householder's lifestyle. Balanced against the pervasive nature of the governmental intrusion is the relatively minor burden on law enforcement of obtaining a search warrant, or, where exigent circumstances intervene, of demonstrating probable cause. This latter burden seems a small price to pay to maintain basic right of privacy.

Further, in the unique posture at the present case, it is respectfully submitted that no state can be allowed to declare a right of privacy to be fundamental and inalienable, and arbitrarily render that right meaningless and unenforceable by not applying an exclusionary rule to evidence seized in violation of that right. Under such circumstances, the Due Process Clause of the Fourteenth Amendment should mandate exclusion.

The decision of the Court of Appeal should be affirmed.

Respectfully submitted,

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In The  
**Supreme Court of the United States**

October Term, 1987

— o —  
CALIFORNIA,

*Petitioner,*

v.

BILLY GREENWOOD and  
DYANNE VAN HOUTEN,

*Respondents.*

— o —  
**ON WRIT OF CERTIORARI TO THE COURT OF  
APPEAL OF THE STATE OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT**

— o —  
**PETITIONER'S REPLY BRIEF**  
— o —

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## I.

### **WHETHER AN EXPECTATION OF PRIVACY IS A 'LEGITIMATE' EXPECTATION UNDER THE FOURTH AMENDMENT IS NOT DETERMINED BY REFERENCE TO INDEPENDENT STATE GROUNDS.**

Greenwood, contrary to his position below (J.A. 2-3), now argues that he had a legitimate expectation of privacy under the Fourth Amendment by virtue of "the impact of State law."

While a state may insist on a more demanding standard under its own constitution or statutes, it would not purport to be applying the Fourth Amendment when it invalidates a search. [*New Jersey v. T.L.O.* (1985) 469 U.S. 325, 344 Ftnt. 10; *Cooper v. California* (1967) 386 U.S. 58, 61].

Greenwood's view of determining the 'legitimacy' of an expectation of privacy is contrary not only to federal law (*Rakas v. Illinois*, 439 U.S. 128, 143, Ftnt. 12), but to California law.

As stated in *People v. Crowson* (1983) 33 Cal.3d 623, 629 (190 Cal.Rptr. 165):

In the search and seizure context, the article I, section I "privacy" clause has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I section 13 of the California Constitution. "[T]he search and seizure and privacy protections [are] coextensive when applied to police surveillance in the criminal context." [Article I, section I, article I, section 13 and the Fourth Amendment] apply only where parties . . . have a 'reasonable expectation of privacy' . . .

Respondent's argument reduces this court's power to interpret the Fourth Amendment to determining what the law of any of the 50 states says it is.

Is the Fourth Amendment different in each state? Is it the highest standard any of the 50 states determines their independent documents impose?

Respondent's attempt to engraft independent state grounds onto a then dependent Fourth Amendment should be rejected.

## II.

### **ONE WHO PLACES DISCARDED TRASH IN AN AREA ACCESSIBLE TO THE GENERAL PUBLIC FOR COLLECTION ABANDONS ANY LEGITIMATE EXPECTATION OF PRIVACY IN SUCH TRASH.**

Van Houten argues that "contrary to petitioner's assertions, those courts which have sought to determine the legitimacy of a householder's expectation of privacy in trash containers are neither unanimous nor necessarily foolhardy." (RB 23).

What petitioner asserted, however, was: a) the federal circuit courts of appeal are unanimous (PB 11) which Van Houten concedes (RB 14); and b) the majority of state courts<sup>1</sup> have concluded that warrantless trash searches of garbage left out for collection are not violative of the Fourth Amendment (PB 13), hardly refuted by respondent's reference to Hawaii's independent state ground case or 'thoughtful dissents' in 5 state opinions (RB 21).

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<sup>1</sup> In addition to the state decisions cited in Petitioner's Brief, pp. 13-14 are added: *Commonwealth v. Chappee* (1986) 397 Mass. 508, 492 N.E.2d 719; and *Cooks v. State* (1985) (Okla.) 699 P.2d 653, cert. den. — U.S. —, 106 S.Ct. 268, 88 L.Ed.2d 275

Petitioner agrees with Van Houten that the overwhelming weight of authority which finds such searches lawful is not foolhardy.

Van Houten exaggerates in claiming that “thrice the California Supreme Court has examined the question and concluded that a householder has a legitimate expectation of privacy in trash left at curbside.” (RB 21).

*Edwards*, 71 C.2d 1096, involved a search, on site, by police of trash cans within a few feet of the back door of defendant’s residence (71 C.3d at 1099 and 1104). ‘*Krivda II*’ merely held, on remand, that when the case had been decided, the court had an independent state ground (8 Cal.3d 623).

Similarly inflated is respondent’s characterization of discarding garbage as “an individual’s decision to place his life’s possessions in a pail or bag for collection.” (RB 12).

Van Houten claims that ‘a number of state courts and federal circuits’ have erred by utilizing property law concepts such as abandonment. In support she cites, among other cases, *State v. Schultz* (Fla.) 388 So. 2d 1326, at 1330 (RB 10, ftnt 11)

That citation, however, is to the dissent. The majority opinion, which held the search lawful, states, at 1329:

... it is necessary to discuss abandonment, not in the sense of personal property concepts, but rather as it relates to an expectation of privacy.

The courts which have rejected the argument respondents advance haven’t focused on the garbage, but rather on what happens to an individual’s legitimate expectation

of privacy when he voluntarily places that garbage in an area accessible to the public for collection by a third party. (See 40 ALR 4th 381, *Search and Seizure: what constitutes abandonment of personal property within the rule that search and seizure of abandoned property is not unreasonable—modern cases.*)

As stated in *State v. Oquist* (1982 Minn.) 327 N.W.2d 587 at 589-590:

Accordingly, the constitutionality of the reconnaissance of garbage may no longer be tested merely by the application of traditional property law concepts of abandonment and trespass. We have, however, previously noted the distinction between abandonment in the property-law sense and abandonment in the constitutional sense. Under the law of property, the question is whether the owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest. Under the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his expectation of privacy with respect to the property so that neither search nor seizure is within the proscription of the fourth amendment. "In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein."

### III.

**THAT DISCARDED TRASH IS MOVABLE (AS IS ALL PERSONAL PROPERTY) IS NO REASON TO IMPOSE A PROBABLE CAUSE REQUIREMENT WHERE THERE IS NO LEGITIMATE EXPECTATION OF PRIVACY.**

Van Houten equates movable refuse to an automobile and claims a lesser expectation of privacy which requires probable cause, if not a search warrant.



That rationale was squarely rejected in *United States v. Chadwick*, 433 U.S. 1. [*United States v. Ross*, 456 U.S. 798, 809-810].

Where inspection by the police does not intrude upon a legitimate expectation of privacy, there is no "search" subject to the warrant clause. [*Illinois v. Andreas* (1983) 463 U.S. 765, 771]. For the same reason that no warrant is required, neither is probable cause. Discarded trash does not present an exception to the warrant requirement, rather a situation where the Fourth Amendment is not implicated.

Unlike the great variety of work environments in the public sector that called for a case by case analysis in *O'Connor v. Ortega*, 480 U.S. —, 94 L.Ed.2d 714, 723 (plurality opinion by Justice O'Connor), no such variety exists with regards to discarded trash placed outside the curtilage for collection or removed from the curtilage by the authorized collector. This court should establish a 'bright line rule'. (See *Oliver v. United States*, 466 U.S. 170, 181).

The brief of Amici Curiae of Americans for Effective Law Enforcement, Inc., et al., submits, and the dissent in *Rooney, supra*, seemed to conclude, this line should deny any reasonable expectation of privacy in trash placed for collection in an area accessible to the public. Although beyond the requirement of Petitioner's facts at bar, Petitioner concurs.

**CONCLUSION**

For the foregoing reasons and for those set forth in Petitioner's Brief filed upon the granting of Certiorari, it is respectfully submitted the judgment of the California Court of Appeal, Fourth Appellate District should be reversed.

Respectfully submitted,

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In The  
Supreme Court of the United States  
October Term, 1987

STATE OF CALIFORNIA,

*Petitioner,*

*v.*

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*Respondents.*

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MOTION TO FILE BRIEF  
AND  
BRIEF AMICI CURIAE OF  
AMERICANS FOR  
EFFECTIVE LAW ENFORCEMENT, INC.,  
JOINED BY  
THE CALIFORNIA PEACE OFFICERS'  
ASSOCIATION, INC.,  
THE INTERNATIONAL ASSOCIATION OF  
CHIEFS OF POLICE, INC.,  
THE LEGAL FOUNDATION OF AMERICA,  
THE NATIONAL DISTRICT ATTORNEYS  
ASSOCIATION, INC., AND THE  
NATIONAL SHERIFFS' ASSOCIATION,  
IN SUPPORT OF THE PETITIONER.

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IN SUPPORT OF THE PETITIONER.**

---

**MOTION OF AMICI  
CURIAE TO FILE BRIEF**

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Come now Americans for Effective Law Enforcement, Inc., *et al.*, and move this Court for leave to file the attached brief as *amici curiae*, and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

**Americans for Effective law Enforcement, Inc. (AELE)**, as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-eight times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

**The California Peace Officers' Association, Inc. (CPOA)**, is a non-profit corporation devoted to the training and professionalization of state and local law enforcement officers in the State of California. It sponsors educational programs, publications and the establishment of standards for the performance of law enforcement functions. As such, it is vitally interested in the delivery of the highest quality law enforcement service to the citizens of that State.

**The International Association of Chiefs of Police, Inc. (IACP)**, is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 67 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA), is a non-profit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's, attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting all rights guaranteed under the Constitution.

2. *Desirability of an Amici Curiae Brief.* Amici are professional associations representing the interests of law enforcement agencies at the national, state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility, *inter alia*, of obtaining and executing arrest and search warrants and making warrantless arrests and searches, and (2) prosecutors, county counsel and police



legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors-including active law enforcement administrators and counsel-we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, CPOA, IACP, LFA, NDAA, and NSA are state and national associations, and their perspective is broad. This brief concentrates on policy issues, including the values served by the reasonable expectation of privacy under the Fourth Amendment, and the need to give law enforcement agencies clear guidance with respect thereto. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.


4. *Avoidance of Duplication.* Counsel for *amici curiae* has conferred with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents several issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of all parties. The consent of Petitioner has been received, and the consent has been filed with the clerk of this Court. This Motion is necessary because counsel for Respondents have not, as of the time of filing, granted consent to the *amici*.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The Interest of *Amici Curiae* is as stated in the above  
Motion to File Brief.

## ARGUMENT

### THERE IS NO REASONABLE EXPECTATION OF PRIVACY FOR PURPOSES OF THE FOURTH AND FOURTEENTH AMENDMENTS WITH RESPECT TO PERSONAL PROPERTY PLACED IN AN AREA ACCESSIBLE TO THE PUBLIC.

The court below, *People v. Greenwood*, 182 Cal.App.3d 734, 277 Cal.Rptr. 539 (Cal. App. 4 Dist. 1986), held, in reliance upon *People v. Krivda*, 5 Cal.3d 357, 486 P.2d 1262 (1971), cert. granted and remanded, 409 U.S. 33 (1972), on remand, 8 Cal.3d 623, 504 P.2d 457 (1973), that warrantless searches of garbage that had been placed outside the respondents' house and picked up by trash collectors violated their Fourth Amendment rights of privacy. Certiorari was granted by this Court to consider the issue of whether warrantless searches of discarded garbage violate the Fourth and Fourteenth Amendments, and, in effect, to consider again the issues raised in *People v. Krivda* originally in this Court and on remand in the Supreme Court of California.

*Amici* note that the grant of certiorari in this case followed by a few days the dismissal of the writ of certiorari as improvidently granted in *People v. Rooney*, 175 Cal. App.3d 634, 221 Cal. Rptr. 49 (1985), cert. dis., — U.S. —, 107 S.Ct. 2852, 41 CrL 3362 (1987), a case raising similar issues in the context of the warrantless search by police officers of garbage and trash placed in a communal trash bin. *Amici* (with the exception of the California Police Officers' Association, Inc.) filed a brief in *People v. Rooney* and wish to repeat our argument made in that case but not considered, since the Court did not reach the merits in *Rooney*.

We will not, however, duplicate the case law analysis presented by the Petitioner in this case, although we agree with that analysis. Instead, we will concentrate upon different issues and issues of policy that concern our law

enforcement constituency.

We note, however, that the issues involved in this case could readily have been resolved by the court below by the application of several cases from courts that have dealt with the issue of abandonment, see *LaFave, Search and Seizure* (1978), Section 2.6 (b) and 1986 Supplement, and searches of trash containers. See e.g., *United States v. Harruff*, 352 F. Supp. 224 (E.D. Mich. 1972); *Smith v. State*, 510 P.2d 793 (Alaska 1973); *Willis v. State*, 518 S.W.2d 247 (Text. Crim. 1975).

In *Smith v. State*, for example, the police, on suspicion that narcotics activity was taking place in a particular unit of an apartment building, searched a dumpster located next to the building and found evidence that was used to obtain a search warrant for an apartment. The *Smith* court stated in finding no violation of the Fourth Amendment: "...it would be reasonable to expect trash to be accidentally removed \* \* \* by running children, passing cars, stray dogs, or even a visitor." 510 P.2d at 798.

In the recent case of *State v. Krech*, 403 N.W.2d 634 (Minn. 1987), the court found that trash bags deposited in the backyard of a duplex building were "abandoned property" and that a warrantless entry into the backyard by police to seize the bags did not violate a reasonable expectation of privacy of residents of the duplex.

It is submitted that *Smith* and other cases that have found no violation of the Fourth Amendment in the search of trash containers, whether they be individual containers belonging to one person, as in the instant case, or communal containers, as in *People v. Smith* and *People v. Rooney*, recognize a fundamental fact of life in modern society. It is common knowledge, as recognized by these courts, that trash containers play a unique role in our society. Not only are they used for the placement into them of refuse and trash by large numbers of people (including many nonresidents of the houses or apartment complexes to which they



are often attached, such as passers-by and other neighborhood residents), but they are commonly known to be visited by a wide array of persons, some of whom stop and rummage and remove material *out of* them: other apartment dwellers and neighbors, passers-by, curiosity seekers, itinerant trash pickers,<sup>1</sup> children at play, and - in increasing

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<sup>1</sup> For references to the common activities of the homeless mentally ill in our large cities in obtaining their daily needs from trash containers, see Goleman, "To Expert Eyes, City Streets Are Open Mental Wards," New York Times, November 4, 1986, pp. 21, 22:

"...seen through the eyes of a mental health worker, Broadway is a very different street. The swank and style recede, and a bent old woman in a filthy coat, fishing a slice of bread from the garbage can by Zabar's, and a man wrapped in a grimy blanket, huddled on the sidewalk by Lincoln Center talking earnestly with no one, come into focus. \* \* \*

This is the Broadway polite eyes avoid, an open psychiatric ward where those with severe mental illness find asylum of sorts in a bench or doorway. Broadway, with its busy traffic and mall-like traffic islands with benches, seems to be one of those public spaces that invites the mentally ill to set up housekeeping. And what is happening there is typical of many other streets and parks in cities throughout the country. \* \* \* The woman who had retrieved bread from the garbage can by Zabar's for instance, pulled herself into a dignified huff and marched across the street. There, she found the remains of a pizza in another garbage can."

As also noted by the dissenting opinion in *People v. Rooney*, cert. dis., \_\_\_ U.S. \_\_\_, 107 S.Ct. 2852, 41 CrL 3362, 3366, n.3, even archeologists have taken to examining peoples' trash, using in one study sanitation personnel to randomly examine trash set out for collection by householders in Tucson, Arizona. Rathje, *Archaeological Ethnography . . . Because Sometimes It is Better to Give than to Receive*, in *Explorations in Ethnoarchaeology* 49, 54 (R. Gould ed. 1978). As noted in the opinion: "[t]he archaeologists sorted the refuse from each household into more than 150 categories in order to improve their understanding of contempor-



numbers - a distinct group that might be called "dedicated non-professional scavengers," people who for environmental, hobby, or monetary reasons collect certain forms of trash in easily accessible areas such as roads, parkways, embankments, sidewalks, alleys and ways, junk deposited in front of dwellings, trash barrels, dumpsters, and communal trash bins.

People in this latter group frequently look for specific items, such as furniture or clothing that can be sold at flea markets and garage sales, or beverage containers that can be sold to recycle firms or returned to stores for payment of cash. Indeed, whole, relatively new industries depend in part upon their efforts in rummaging through other peoples' garbage. As noted in 28 Environment 22 (April 1986):

### TURNING PLASTIC BOTTLES INTO WINDBREAKERS

The soda bottle you recycle today could turn up in the windbreaker or rug you buy next year. A textile machinery distributor, Chima, in Reading, Pennsylvania, is introducing technology developed in West Germany for converting recycled PET (polyethylene terephthalate) bottles into polyester fabric. The process produces a polyester film that can be made into carpet backing, clothes, and imitation leather. *The Plastic Bottle Reporter*, Winter.

These facts are not novel. Every apartment dweller and home owner who places trash into a trash container accessible to the public knows that periodically a substantial portion of such trash disappears before the garbage or dumpster truck arrives. It is, as noted, a fact of life accepted by most people. Indeed *amici* can assure this

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1 (Continued)

ary society (as well as to refine techniques for understanding the material culture of earlier societies)."

Court that few law enforcement agencies from among our constituencies, receive complaints against such scavengers for trespass, loitering, or littering. Most such scavengers are quick, unobtrusive, and non-littering, if they expect to return to their routine in a particular location without interference.

*Amici* submit, however, that, as in *People v. Rooney*, there is more involved in this case than the commonly known activities of scavengers, and the commonly accepted lack of privacy in trash containers, whether individual or communal. Some have argued that privacy, at bottom, is really the way society looks at various elements of human conduct and certain "habits of life."

Privacy, no less than good reputation or physical safety, is a creature of life in a human community and not the contrivance of a legal system concerned with its protection. We should not be misled, therefore, in speaking of a legally recognized interest in privacy or the rights attending it. Privacy in these contexts does not exist because of such recognition, but depends only upon habits of life.

Gross, *The Concept of Privacy*, 42 N.Y.U.L.Rev. 34, 36 (1967).

Yet this Court has endeavored to formulate a legal standard for the protection of the right to privacy, an effort that was presaged by the seminal work of Warren and Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890), and an effort that *amici* applaud as vitally necessary to the maintenance of law and order in a free society. In *Katz v. United States*, 389 U.S. 347, 351, this Court set forth the legal standard thusly: "... the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection ..." The question of what constitutes an intrusion sufficient to constitute a search for Fourth Amendment purposes turns upon the *Katz* defini-

tion of "reasonable expectation of privacy," which has been regarded as having two elements: (1) the individual must have a *subjective expectation* that a thing or activity will be kept private, and (2) *society must objectively recognize the reasonableness of that expectation*. 389 U.S. at 361 (concurring opinion of Justice Harlan). Cf., *Hester v. United States*, 265 U.S. 57 (1924).

*Amici* submit, as we did in *People v. Rooney*, that it is time for this Court to re-examine the basic *Katz* formulation, and in particular, the requirement that "society must objectively recognize the reasonableness of that expectation." The decision of the court below flies in the face of reason. Modern realities of life would quickly convince any rational person that society does not objectively recognize the reasonableness of an expectation of privacy in the contents of trash containers visited by a small army of persons on a predictable basis.

Reason, common sense, and the *Katz* formulation did not prevail in the court below,<sup>2</sup> and sometimes do not prevail in other courts. Many equally strained applications of the *Katz* formulation can be found collected in LaFave, *Search and Seizure* (1978), Section 2.1(d) and 1986 Supplement.

*Amici* submit that many courts, such as the court below, and the Supreme Court of California in *People v. Krivda* in its original opinion and on remand, have lost sight of the fact that, "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver v. United*

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<sup>2</sup> Indeed the court below did little but undertake a mechanical application of *People v. Krivda* on remand, 8 Cal.3d 623, 504 P.2d 457 (1973), a decision that is clearly out of step with the development of the right to privacy concept since 1973.

*States*, 466 U.S. 170, 104 S.Ct. 1735, 1743 (1984). It is time for this Court to elevate the second aspect of the *Katz* formulation from the concurring opinion of Justice Harlan, into a clear, *bright line* declaration that can be followed by law enforcement officers and understood by courts and the public.

We submit that Society - the majority of those who engage in the "habits of life" common to us all, would reject the notion that a person retains a *reasonable* expectation of privacy in trash cast into a trash container that is accessible to the public. We further submit that Society is not "prepared to recognize as 'reasonable' " a belief that contraband or evidence of crime placed in an area accessible to the public can EVER be shielded by the Fourth Amendment right to privacy. We ask this Court to give a clear, forthright declaration to that effect for the guidance of law enforcement officers. It is as noted by Judge (later Chief Justice) Burger in his dissent in *Work v. United States*, 243 F.2d 660, 665 (D.C. Cir. 1957):

Honest citizens neither need nor, I think, want protection for their privacy extended to these artificial limits . . . Of course the guilty have the same protective safeguards as the innocent and I would afford them as much. But I refuse to join in what I consider an unfortunate trend in judicial decisions in this field which strain and stretch to give the guilty, not the same, but vastly more protection than the law abiding citizen.

## CONCLUSION

*Amici* respectfully request this Court to (1) reverse the decision of the court below on the basis of law and sound judicial policy, (2) declare THAT WHENEVER CONTRABAND OR EVIDENCE OF A CRIME IS PLACED IN AN AREA ACCESSIBLE TO THE PUBLIC OR ANY SUBSTANTIAL PART THEREOF, IT LACKS CONSTITUTIONAL PROTECTION, and (3) declare that in any event the police in this case acted in good faith within the parameters of the good faith exception to the exclusionary rule recognized in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424 (1984).

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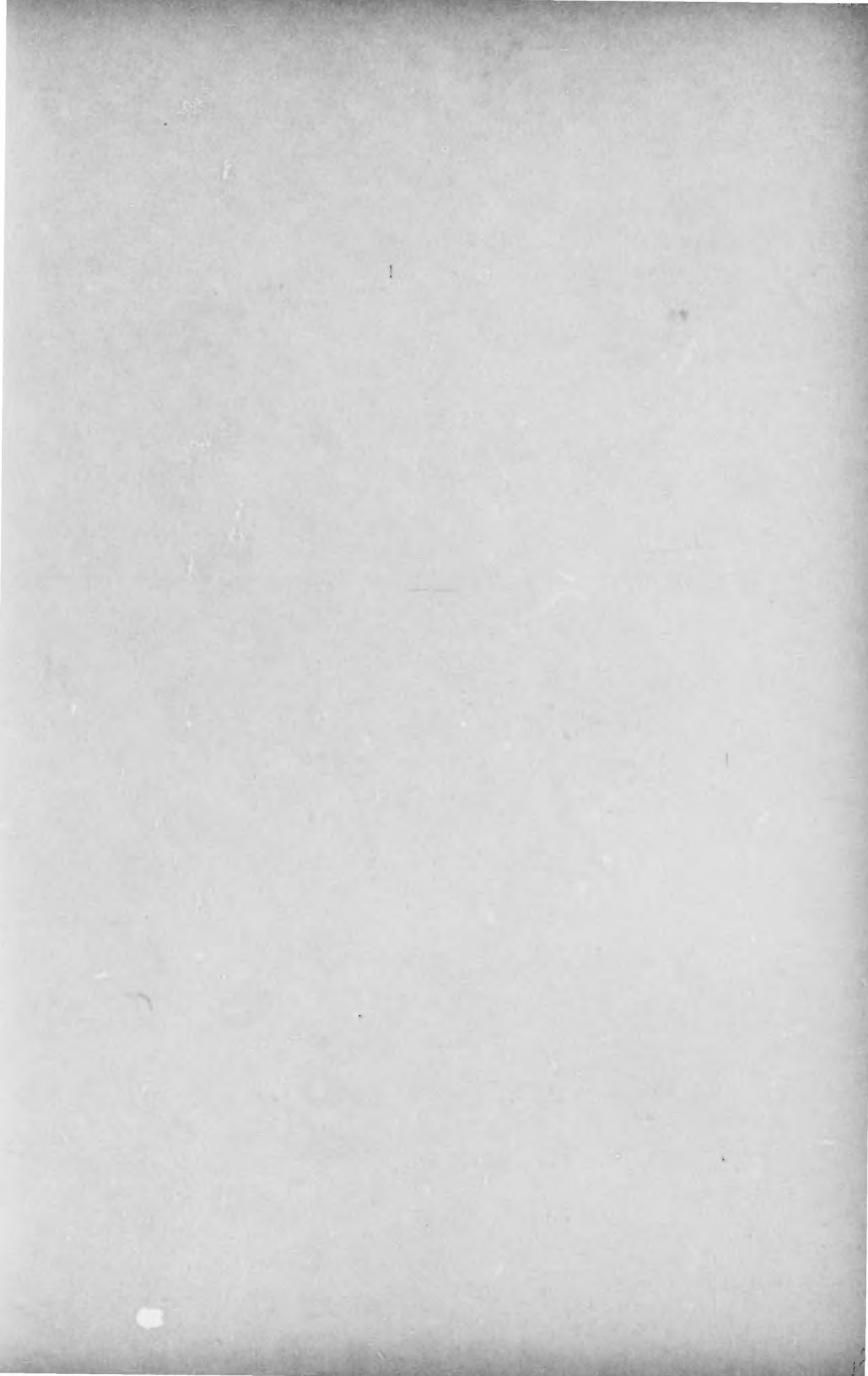
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No. 86-684

Supreme Court, U.S.  
FILED

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JOSEPH F. SPANIO, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

Petitioner,

v.

**BILLY GREENWOOD AND  
DYANNE VAN HOUTEN,**

Respondents.

ON WRIT OF CERTIORARI TO THE  
COURT OF APPEAL OF CALIFORNIA  
FOURTH APPELLATE DISTRICT

BRIEF AMICI CURIAE IN SUPPORT OF  
PETITIONER BY THE STATES OF CALIFORNIA,  
FLORIDA, HAWAII, INDIANA, KENTUCKY,  
MINNESOTA, PENNSYLVANIA, SOUTH  
CAROLINA, TENNESSEE, WASHINGTON, WISCONSIN,  
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No. 86-684

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

---

THE PEOPLE OF THE STATE OF CALIFORNIA,  
Petitioner,

v.

BILLY GREENWOOD AND  
DYANNE VAN HOUTEN,

Respondents.

---

ON WRIT OF CERTIORARI TO THE  
COURT OF APPEAL OF CALIFORNIA  
FOURTH APPELLATE DISTRICT

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INTEREST OF AMICI CURIAE

This case presents a significant issue respecting the Fourth Amendment's application. At issue is whether the California court's constitutional distinction between police and others, such as garbage collectors, who examine trash set out for collection, is to be adopted by this Court. That approach calls into question continued adherence to

Katz v. United States, 389 U.S. 347 (1967) since it eliminates the need to exhibit an actual expectation of privacy in order to assert the Fourth Amendment's protection.

The Amici States have a direct interest in the resolution of this issue in view of its broad implications for a wide variety of search and seizure cases.

In addition, adoption of the California court's limitation on trash examination could lead to confusion among officials as to the sorts of garbage protected and a loss of confidence by the public in the ability of local law enforcement officers to carry out their duties in an appropriate manner.

This brief is filed pursuant to Rule 36.4 of the Court.

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**SUMMARY OF ARGUMENT**

A person does not exhibit an actual expectation of privacy in trash placed on the street for collection and therefore subsequent examination of collected trash by police does not violate the Fourth Amendment.

Respondents placed their trash outside the curtilage for collection, manifesting an obvious intent to permanently disassociate themselves from it and a desire that others take it. Respondents lacked control over who could view their trash and failed to take obvious measures against its connection to them becoming known.

Distinctions between examination of trash by the garbage collector on one hand and trained police seeking evidence of crime on the other hand are inconsistent with this Court's precedent. Moreover, the rule followed by the lower court, which depends upon whether trash has lost

its "identity," violates the basic principle that the legality of challenged police actions does not turn upon their fruits.

It is precisely because garbage cans are not where we keep valued things that they lack association with personal privacy except in the home or curtilage as an adjunct of the family economy. Trash placed for collection outside the curtilage, or removed from the curtilage by the authorized collector, passes into a sphere where access by others is uncontrolled and privacy expectations in castaway property evaporate.

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**ARGUMENT****AN INDIVIDUAL'S TRASH COLLECTED  
BY THE AUTHORIZED COLLECTOR IS  
NOT PROTECTED FROM LATER  
GOVERNMENTAL EXAMINATION**

- A.    No Subjective Privacy Expectation In Trash Is Exhibited When It Is Placed Outside The Curtilage Or Removed From The Curtilage By An Authorized Collector.**

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . ." The California Court of Appeal in this case affirmed the dismissal of an information charging respondents with narcotics trafficking because two search warrants were based on the contents of trash bags on the street in front of Greenwood's house which were collected by the garbage collector and segregated in the garbage truck for later examination by police lacking either a warrant or probable cause. People v. Greenwood, 182 Cal.App.3d 729, 227 Cal.Rptr. 539 (1986);

See C.T. 91, 101, 102, 301, 308-309. Thus, the question is squarely presented whether collected trash is protected from governmental examination under the Fourth Amendment.

A protected privacy interest under the Fourth amendment exists only if the individual complaining of police conduct exhibited an expectation of privacy which society recognizes as objectively reasonable. California v. Ciruolo, 476 U.S. \_\_\_, 90 L.Ed.2d 210, 215, 106 S.Ct. 1809, 1811 (1986); Oliver v. United States, 466 U.S. 170, 177 (1984); Smith v. Maryland, 442 U.S. 735, 740 (1979). The challenged state activity here consisted of looking at trash left for collection on the street which was picked up by the authorized trash collector and deposited in a cleared portion of the garbage truck well. While it sometimes may not be clear whether an individual "manifested a subjective expectation of privacy from all

observations . . . , or whether instead he manifested merely a hope that no one would observe . . . " , California v. Ciruolo, 476 U.S. at \_\_\_\_ , 90 L.Ed.2d at 216, 106 S.Ct. at 1812 (emphasis original), no such uncertainty appears when a person's trash placed for collection outside his home's curtilage is examined after its collection.

Few individuals harbor actual expectations concerning the security of their trash after it is collected. It undoubtedly is a matter of complete speculation to such persons whether items they deposited later will be noticed by others.

Individuals who do subjectively expect their deposited trash to remain unseen certainly do not exhibit such an expectation by placing it outside the curtilage in an area immediately accessible to outsiders for collection. Such individuals intend the trash

collector to take possession and convey the trash somewhere else for disposal, but no relationship of trust between the authorized collector and the homeowner ordinarily exists to regulate whether the former allows another to examine the trash. Indeed, collectors frequently may form contractual relationships which allow third parties to examine trash for reusable or contaminating items. Moreover, trash depositors all know that bags or bins at the street corner awaiting collection are practically useless as a way of preserving privacy since the trash is accessible there to scavengers, children and animals just as at a landfill following disposal. Thus, whatever subjective expectation people may harbor respecting whether collected trash will be maintained inviolate pending its complete destruction, the inability to exclude others once placed for collection outside the curtilage and the implicit



renouncement of any desire to retain those things is counter to any concept of manifesting desired privacy.

**B. No Objectively Reasonable Privacy Expectation Existed.**

Except in California, People v. Krivda, 5 Cal.3d 357, 96 Cal.Rptr. 68, 486 P2d 1262 (1971), remanded, 409 U.S. 33 (1972), on remand, 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457, cert. denied, 412 U.S. 919 (1973), courts finding the Fourth Amendment violated with respect to trash have done so strictly in the context of an uninvited police entry into the curtilage without consent, or other justification. Fixel v. Wainwright, 492 F.2d 480, 483-484 (5th Cir. 1974) (fenced backyard of apartment building); Work v. United States, 243 F.2d 660, 662 (D.C. Cir. 1957) (underneath home's porch); State v. Broom, 113 Ariz. 495, 557 P.2d 1052, 1054 (1976) (fifteen feet behind home in place not open to garbage

collector); State v. Chapman, 250 A.2d 203, 212 (Maine 1969) (inside garage under home); Everhart v. State, 274 Md. 459, 337 A.2d 100, 114-115 (1975) (apparent farmhouse yard; remanded for determination); Bolen v. State, 544 S.W.2d 918, 920 (Tenn. Crim. 1976) (private area of home adjacent to private driveway); Ball v. State, 57 Wis.2d 653, 205 N.W.2d 353, 355-358 (1973) (home's backyard).<sup>1</sup>

Respondents clearly were not faced with such an uninvited intrusion upon the "sanctity of a man's home and the privacies of life." Oliver v. United States, 466 U.S. at 180. It is self-

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1. Even if the trash was placed for collection within the private areas of the home, at most the collector in the normal course of entering the area acts in our view as an undercover agent, and an entry by an undercover agent is not illegal if he entered "for the very purposes contemplated by the occupant." Lewis v. United States, 385 U.S. 206, 211 (1966); See Hoffa v. United States, 385 U.S. 293, 302 (1966). In that case as well the homeowner simply has put misplaced confidence in the collector.

evident that the trash placed on the street in front of Greenwood's residence was not within the curtilage of his home. See United States v. Dunn, 480 U.S. \_\_\_, \_\_\_, 94 L.Ed.2d 326, 334-335, 107 S.Ct. 1134, 1139-1140 (1987).

Nor were police improperly pursuing their investigation by taking note of what was there. "[T]he Fourth Amendment 'has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.'" Id., at \_\_\_, 94 L.Ed.2d at 236, 107 S.Ct. at 1141, quoting California v. Ciraolo, 476 U.S. at \_\_\_, 90 L.Ed.2d at 216, 106 S.Ct. at 1812.

Once respondents' trash was deposited on the street certainly by the time it was collected by the authorized collector--they had lost any control whatsoever over the trash. Consequently, respondents assumed the risk it might be conveyed to police. "This Court consistently has held

that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. at 743-744.

That principle works no harsh result in this case. Once "trash is discarded the former owner rarely has any further interest in it other than to be assured that it will not remain at his doorstep. In the rare instance when he desires to preclude inspection by others of private papers in his garbage he may do so by first shredding or burning them or by hand-delivering the papers to a garbage-grinding machine." United States v. Terry, 702 F.2d 299, 309 (2d Cir.), cert. denied, 461 U.S. 931 (1983). "There is nothing unfair about requiring that people not discard things they want to keep secret, or destroy them before they do." United States v. Kramer, 711 F.2d 789, 792 (7th Cir.), cert. denied, 464 U.S. 962 (1983).

Respondents may argue, however, that Krivda correctly differentiates between risks assumed by a trash depositor as between collectors and police. People v. Krivda, 5 Cal.3d at 366-367, 96 Cal.Rptr. at 68, 486 P.2d at 1268. This distinction, however, is traceable to a misreading of Katz v. United States, 389 U.S. 347 (1967) which indicated quite the opposite. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Id., at 351 (emphasis added.).

This kind of distinction between police and third persons, was repudiated in California v. Ciraolo 476 U.S. \_\_\_, 90 L.Ed.2d 210, 106 S.Ct. 1809, where the Court was confronted with the argument that police aerial observation of a fenced backyard was a search because the police flight was specifically focused on a particular yard to identify marijuana.

The Court rejected this contention stating:

"The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace . . . in a physically nonintrusive manner; from this point they were able to observe plants readily discernable to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor."

476 U.S. at \_\_\_, 90 L.Ed.2d at 217, 100 S.Ct. at 1813 (fn. omitted.). While the Fourth Amendment encompasses state and not private action, it does not follow that "annoying" behavior of private parties becomes unconstitutional when conducted by police.



Respondents' claim lacks roots in "concepts of real or personal property law or understandings that are recognized and permitted by society." Rakas v. Illinois 439 U.S. 128, 143-144, n. 12 (1978). Respondents may well have been concerned that the contents of the trash not fall into the hands of police but this does not of course establish a legitimate expectation of privacy in collected trash.

Respondents may claim that the local ordinances prohibiting unlicensed persons from rummaging through trash give rise to such expectations. Compare People v. Krivda, 5 Cal.3d at 366, 96 Cal.Rptr. at 68, 486 P.2d at 1268. It is highly doubtful, however, that such ordinances ever restrict garbage collectors from cooperating with police, or, conversely, forbid police from enlisting the aid of the collector in a criminal investigation. Such laws normally address rummaging in owners' garbage cans, not the collector's

garbage truck or anywhere else. Moreover, such ordinances are meant to ensure sanitation and economic protection of the trash collector rather than privacy of the homeowner's trash. See United States v. Vahalik, 606 F.2d 99, 100-101 (5th Cir. 1979), cert. denied 444 U.S. 1081 (1980); People v. Krivda, 5 Cal.3d at 368, n. 1, 96 Cal.Rptr. at 69, 486 P.2d at 1269 (Wright, C.J., concurring and dissenting.); See also Maqda v. Benson, 536 F.2d 111, 113 (6th Cir. 1976) (trash ordinance a matter of local not constitutional law); United States v. Dzialak, 441 F.2d 212, 213 (2d Cir.) (trash ordinance does not affect abandonment), cert. denied, 412 U.S. 919 (1973). Nor is there any indication in this case that respondents relied on such ordinances.

Respondent Greenwood's opposition to the petition for certiorari contains the startling argument that the California Supreme Court's reliance upon articles I,

section 19 (now section 13) of the California Constitution in People v. Krivda, 8 Cal.3d 623, 624, 105 Cal.Rptr. 521, 504 P.2d 457 (1973) reflects the legitimacy of Greenwood's expectation of privacy in his trash. Such an analytical approach of course would leave nothing left of this Court's control over Fourth Amendment protections. In effect, state supreme courts would decide.

In any event, California law is hardly the vehicle on which to hurdle into constitutional obsolescence. As Greenwood recognizes, California courts no longer can suppress evidence in a criminal proceeding for violating the state constitutional search provision. Cal. Const., art. I, § 28, subd.(d). Since agreement with Greenwood's analysis would result in suppressing evidence, he impliedly asks this Court to assume that California favors as its "state law" a right fashioned by the state supreme court

in Krivda over the remedy the people more recently denied him in their state constitution. Of course, there is no way to know if this is the "state law" unless a choice was forced on the people, i.e., the evidence was suppressed. Thus, Greenwood's argument presents a situation where reliance upon a lower court's decision (Krivda) to prove a legitimate expectation of privacy is more than "merely tautological." Rakas v. Illinois, 439 U.S. at 144, n. 12. It is a tautology based on a conjecture.

The claimed reasonable expectation of privacy in trash found by Krivda ceases when garbage loses its "identity by being mixed and combined" with other trash. People v. Krivda, 5 Cal.3d at 367, 90 Cal.Rptr. at 68, 486 P.2d at 1268. Under this theory, garbage does not enjoy permanent Fourth Amendment protection; instead, refuse remains private only until its commingling makes the task of

gathering evidence difficult and unpleasant for the police. Whether or not one's trash will lose its identity and evidentiary utility before commingling cannot be reliably predicted at the time it is discarded. It is not a reasonable expectation of privacy that depends as much upon chance as upon the Constitution.

To avoid this conceptual embarrassment, proponents of the commingling theory urge that if the police feel that the cake is worth the candle, the legality of their subsequent sifting turns on whether the item discovered has evidentiary value, i.e., identity. If it does, they argue, the police have "searched" because the trash was not sufficiently commingled; if nothing of evidentiary significance is found because the trash was adequately commingled, the police may have looked long and hard but they have not "searched." This theory thus resurrects the rejected notion that

the legitimacy of government's action should depend on what turns up. See United States v. Jacobsen, 466 U.S. 109, 144 and n.9 (1984) (cases cited).

Sifting a garbage can is undoubtedly an unpleasant task. Its unwholesomeness is its own self-regulating limitation as a technique of police surveillance. By the same token, it is precisely because garbage cans are not where we keep valued things that they lack association with personal privacy except in the home or curtilage as an adjunct of the family economy.

This limitation arises not so much from the need to protect garbage as the need to protect people in the home and curtilage from police entry. When trash is placed outside the curtilage for collection, or is removed by the authorized collector from within the curtilage, it passes into a categorically different and far more public sphere where



access by others is uncontrolled and any privacy expectations in castaway property evaporate. Since respondent placed his garbage outside the curtilage for collection, any expectation of privacy was not protected by the Fourth Amendment.

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**CONCLUSION**

For the foregoing reasons, it is respectfully submitted the judgment of the California Court of Appeal should be reversed.

DATED: August 10, 1987.

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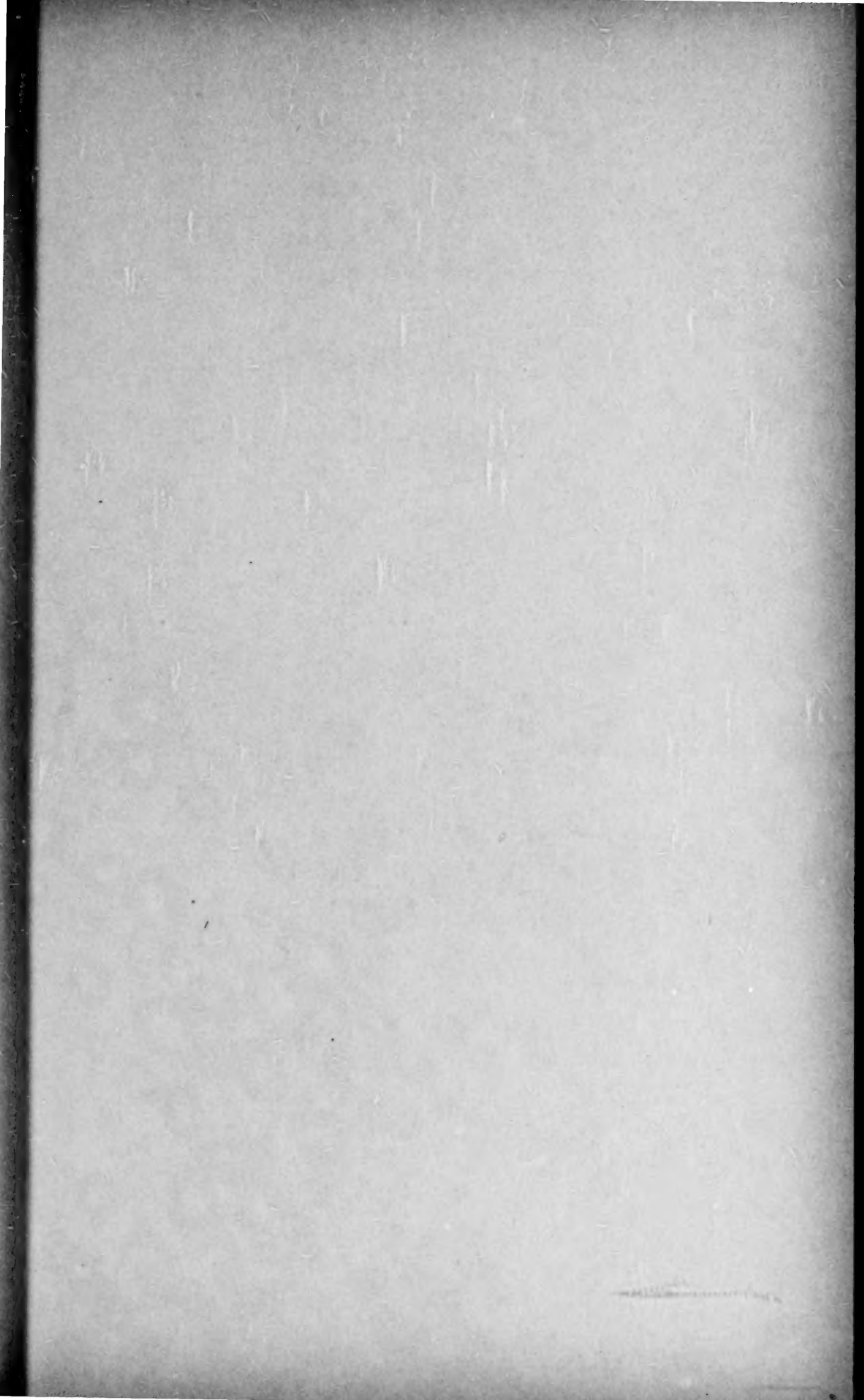
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No. 86-684

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**In The**  
**Supreme Court of the United States**  
**October Term, 1987**

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CALIFORNIA,  
v. *Petitioner,*  
BILLY GREENWOOD and DIANE VAN HOUTEN,  
*Respondents.*

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**ON WRIT OF CERTIORARI TO THE COURT  
OF APPEAL OF THE STATE OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT**

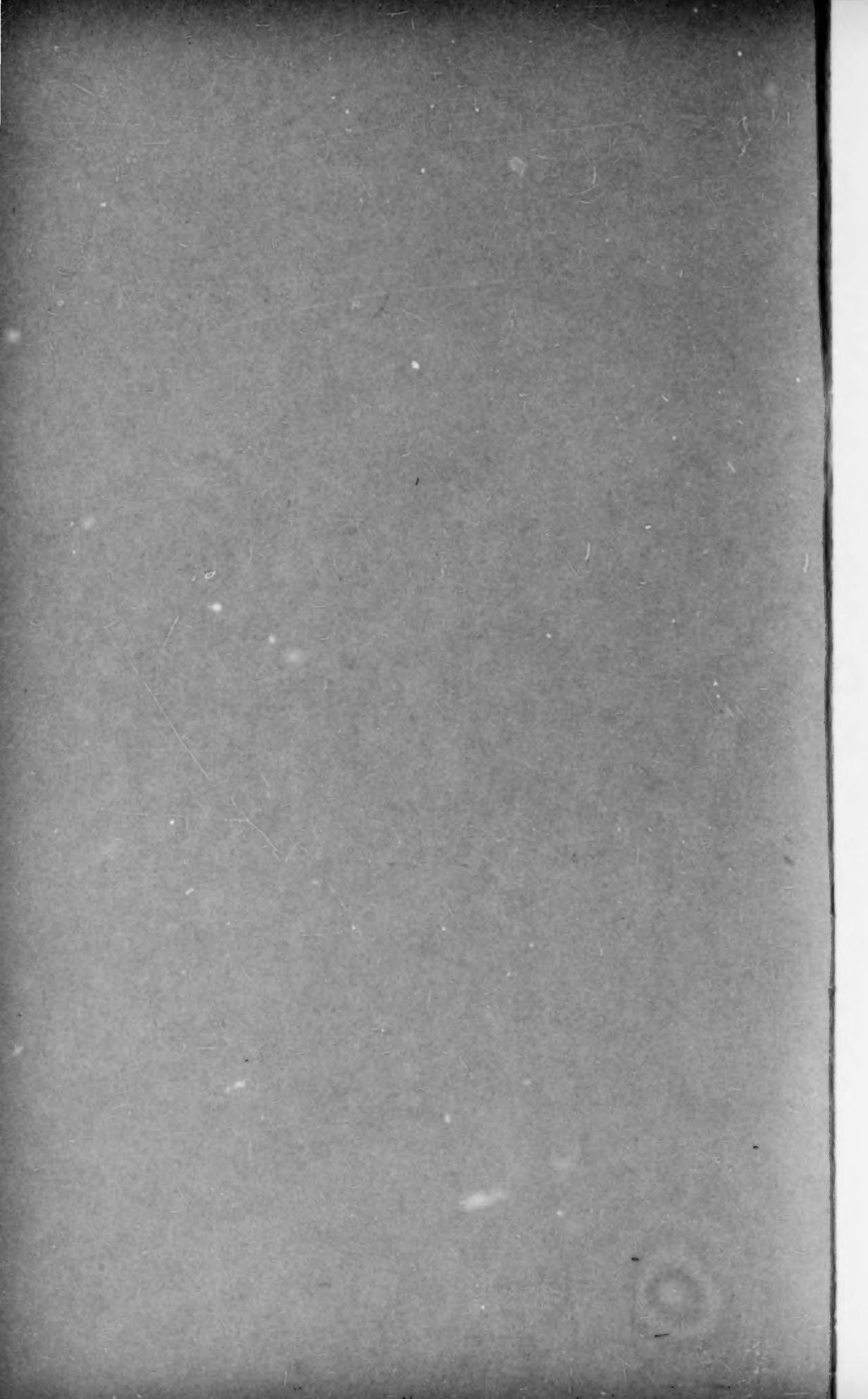
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**RESPONDENT'S REQUEST FOR LEAVE  
TO FILE POST-ARGUMENT  
SUPPLEMENTAL MEMORANDUM AND  
SUPPLEMENTAL MEMORANDUM**

---

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**REQUEST FOR LEAVE TO FILE  
POST-ARGUMENT  
SUPPLEMENTAL MEMORANDUM.**

Respondent Billy Greenwood hereby requests leave of this Honorable Court to file a post-argument supplemental memorandum, which is lodged herewith.

The supplemental memorandum addresses the various reasons why this Court should resolve the merits of Respondent's due process issue.

This memorandum is so submitted because the issue as to whether or not the due process claim was properly before the Court was not squarely posed until oral argument, in the questions posed by the Honorable Chief Justice, and by the Honorable Justice O'Connor. In its Reply Brief, Petitioner had made only a passing reference to the nature of the arguments below (PRB 1), had not specifically raised any procedural bar, had not requested this Court not to address the merits of the issue, and had cited neither the rule in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985),<sup>1</sup> nor any other case for the proposition that the issue was not properly before the Court. Instead, Petitioner briefed the merits of the issue. (PRB 1-2).

It is herein contended that the procedural issue, discussed at oral argument, is thus one to which Respondent did not have an adequate opportunity to respond.

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<sup>1</sup> To this writer's recollection, the first mention of the rule in *Tuttle* in this case was by the Honorable Chief Justice at oral argument.

2(a)

For the foregoing reasons, Respondent requests leave to file the Supplemental Memorandum.

Dated: February 10, 1988

Respectfully submitted,

/s/ MICHAEL IAN GAREY  
*Attorney for Respondent*  
Billy Greenwood

## SUPPLEMENTAL MEMORANDUM

### I.

#### SHOULD THIS COURT REVIEW RESPONDENT'S DUE PROCESS CONTENTION?

Respondent Billy Greenwood, in his brief on the Merits, raised two related additional arguments in support of the judgment below. The first of these (R.B.15-20) suggests that, in Fourth Amendment analysis, state law must be considered in determining the reasonableness of a citizen's expectation of privacy. The second argument in support of the judgment below, alleges that California Constitution, Article I, §28(d) violates the Due Process Clause of the Fourteenth Amendment in that it effectively removes any effective deterrent to violations of the substantively unchanged rights of privacy protected under California Constitution, Article I, §§1, 13.

At oral argument, Justice O'Connor and Chief Justice Rehnquist raised questions as to whether or not this issue was properly before the Court, on the theory that such an issue should have been raised in a brief in opposition to the Petition for Certiorari. As this procedural point was not squarely raised in Petitioner's Reply Brief (P.R.B. 1), Respondent requests this opportunity to adequately respond.

During argument, Chief Justice Rehnquist mentioned the case of "Tuttle". Assuming that case to have been *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), it is most respectfully submitted that the case is inapposite. In *Tuttle*, Respondent asserted for the first time in his brief on the merits, that Petitioner's objection at the trial court level was inadequate to preserve the very



issue that the Court had granted Certiorari to review. Respondent's claim would, in essence, have vitiated the original grant of Certiorari. This Court exercised its discretion to decide the merits of Petitioner's issue, since the non-jurisdictional defect urged by Respondent came too late. Much of the basis for this Court's exercise of its discretion in *Tuttle* is self-evident in the following passage:

But we do not think that judicial economy is served by invoking the Rule at this point, *after* we have granted certiorari and the case has received plenary consideration on the merits. Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived. Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it. Cf. *On Lee v. United States*, 343 U.S. 747, 749-750, n 3, 96 L.Ed. 1270, 72 S.Ct. 967 (1952). *Oklahoma City v. Tuttle*, *supra*, 471 U.S. at 815-816.

(See also, *Weiner v. United States*, 357 U.S. 349, 351, fn. 1 (1958).)

The purpose of the rule cited in *Tuttle* stems largely from the notion that if a respondent has any reason why review by this Court should not occur, the point should be made *before* this Court makes the decision to grant or deny review.

Unlike the situation in *Tuttle*, neither of Respondent's contentions would vitiate review by this Court.

The first of these related contentions merely adds another facet to the determination of what constitutes a reasonable expectation of privacy. The second, dealing with the impact of Due Process on California Constitution, Article I, §28(d), does not assert that no federal question is posed in this case; on the contrary, it asserts that *two* federal questions, rather than one, should be addressed to properly resolve the issues in this case.

And in this context, it bears some emphasis that in *Tuttle* and *Wiener*, the rule was invoked to deny a procedural bar to review on the merits of an issue; Respondent herein does not seek to bar review on the merits. Appropriate herein is the dissenting opinion of Justice Stevens in *E.E.O.C. v. F.L.R.A.*, 476 U.S. \_\_\_\_ [90 L.Ed.2d 19, 25, 106 S.Ct. \_\_\_\_] (1986):

In my opinion the Court should decide the merits of this case. Two federal agencies disagree about the meaning of an important federal statute; it would serve the interests of both to have the disagreement resolved as promptly as possible. To this end, neither agency has suggested that the arguments advanced by the other are not properly before the Court. Since we are now fully advised about the merits, it would be most efficient for us to resolve the issue now rather than to postpone decision until another similar case works its way up through the agency and the Court of Appeals. (Footnote omitted.)

Moreover, in this case, Respondent seeks only to raise a point, related to the merits, in support of the judgment below. (See, *Marshall v. Pletz*, 317 U.S. 383, 390 (1943).)

Further, to the extent that the decision in *Tuttle* is one involving the discretion of this Court as to the

scope of its review, it is respectfully submitted that this Court should exercise its discretion to review the merits of Respondent's Due Process argument. Clearly this court has such discretion, even had the issue not been raised below, which in fact, it had,<sup>1</sup> and especially when the issue is one of pure law, involving no factual issues not developed below. (See, *Singleton v. Wulff*, 428 U.S. 106, 120-121 (1976); see and compare, *Steagald v. United States*, 451 U.S. 204, 209-211 (1981).)

Particularly this is so, where the procedural posture of the case is such that the interest of judicial

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<sup>1</sup> In fact, Respondent repeatedly referred to the obvious violation of state law involved in the trash searches at the Municipal Court level (C.T. 14, 30, 32, 34), in the Superior Court (R.T. 16), and in his brief in the Court of Appeals (J.A. 21, 24). Petitioner's reference to Respondent's argument below is taken out of context. The Fourth Amendment privacy issue was introduced at the Municipal Court as a point of emphasis, not as an exclusive argument. (C.T. 14-16) In the Municipal Court, Respondent also first reserved, and tersely mentioned the potential invalidity of Article I, §28(d). (C.T. 15, 17, 35) And in the Superior Court, in arguing for the judgment of which Petitioner now seeks review, Respondent specifically argued that he did not waive California Constitution, Article I, § 13, and that Article I, §28(d) was violative of the principles laid down by this Court in *Mapp v. Ohio*, 367 U.S. 643 (1961). (R.T. 16). That Respondent, in the lower courts, placed greater emphasis on the impact of *stare decisis* on the issues herein, is neither surprising in view of the binding nature of *People v. Krivda*, 5 Cal.3d 357 (1971) and *People v. Krivda*, 8 Cal.3d 623 (1973), which Petitioner conceded in the Court of Appeals, *People v. Greenwood*, 182 Cal.App.3d 729, 734 (1986), nor should such emphasis preclude plenary review in this Court. (See, e.g. *Mapp v. Ohio*, *supra*, 367 U.S. at 671, concurring opinion by Justice Douglas.)

economy, central to the decision in *Tuttle*, mitigates in favor of prompt review by this Court. (See, *E.E.O.C. v. F.L.R.A.*, *supra*, 476 U.S. at \_\_\_, 90 L.Ed.2d at 25, dissenting opinion by Justice Stevens; *Bowen v. American Hospital Assn.*, 476 U.S. at \_\_\_ [90 L.Ed.2d 584, 599, fn. 14; 106 S.Ct. \_\_\_] (1986).) In the present case, both the procedural posture of this case and the nature of the Due Process issue itself mitigate strongly in favor of review on the merits.

First, because this matter reaches this Court as a review of a motion pursuant to California Penal Code §995, no ruling by this Court will finally determine the search issues; should this Court rule adverse to Respondent, the ruling would be substantial precedent, but would not bar further litigation.

Penal Code §995 provides a procedural device for reviewing the decision of a magistrate in sending a case to Superior Court for trial. Search issues are cognizable in the context of such a motion, because only competent evidence may support the magistrate's decision. (See, *Badillo v. Superior Court*, 46 Cal.2d 269, 271 (1956).) However, a dismissal pursuant to P.C. §995 does not evoke the doctrines of collateral estoppel, or res judicata, and is no bar to further prosecution (*People v. Uhlemann*, 9 Cal.3d 662 (1973)), nor does the affirmation of such a dismissal on appeal bar reprosecution (*Anthony v. Superior Court*, 109 Cal.App. 346 (1980).)

Under California law, the converse is also true. When a motion pursuant to P.C. §995 is denied (which would be the effect of this Court's ruling were it to hold

for Petitioner), a defendant is entitled to a *de novo* motion to suppress pursuant to P.C. §1538.5(i).<sup>2</sup>

As applicable to this case, former P.C. §1538.5(i) provides a *de novo* hearing, at which the rulings of the magistrate at the preliminary hearing are of *no effect*. See, *People v. Baldwin*, 62 Cal.App.3d 727, 732, fn. 3 (1976); *People v. Cagle*, 21 Cal.App.3d 57, 60 (1971). As noted, ante, fn. 3, even under the new procedure, which

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<sup>2</sup> While this case has been on review, §1538.5(i) has been amended to provide that if an evidentiary hearing is held on a motion to suppress at the preliminary hearing, the defense is not entitled to a second *evidentiary* hearing in the Superior Court. (Stats. 1987, C. 828, §99). Since Respondent's decision to litigate the search at the Municipal Court level preceeded the amendment, and no intelligent election was thus made, it is doubtful that the amendment is applicable. (See *Martinez v. Superior Court*, 106 Cal.App.3d 975, 981 (1980), see also *People v. Hobbs*, 192 Cal.3d 959 (1987), Mod. at 193 Cal.App.3d 560a fn.3.) Moreover, even under amended §1538.5, Respondent would merely be precluded from a second evidentiary hearing. Former P.C. §1538.5(i) provided in part:

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure *de novo* on the basis of the evidence presented at a special hearing.



is inapplicable to this case, no bar would exist to prevent Respondent from raising the Due Process argument as to the §1538.5 motion.

Thus, were this Court to decline to review the Due Process argument, and if this Court were to rule against Respondent, Respondent could raise the Due Process claim in the *de novo* motion to suppress. Either side could, and most certainly would, seek review from an adverse ruling, and the matter would work its way up through the judicial system towards an inevitable petition for review by this Court.

Considerations of judicial economy thus mitigate strongly in favor of review at this time.

Finally, the nature of the Due Process issue itself suggests the wisdom of its review at this time, for the issue presents a substantial federal question.

As Respondent has noted in his brief on the merits (R.B. 17-23), California Constitution, Article I, §28(d), does not alter the substantive rights, or zones of privacy, protected pursuant to California Constitution, Article I, §§ 1, 13. (*In re Lance W.*, 37 Cal.3d 873, 886 (1985).) Article I, §§ 1, 13, have long been construed to have a vitality independent of analogous provisions of the Fourth and Fourteenth Amendments to the United States Constitution, and to provide greater protection than that provided pursuant to the Federal Constitution; California continues to recognize the independent force of its own Constitution. (*People v. Mayoff*, 42 Cal.3d 1302, 1312 (1986).)



However, because of the effect of California Constitution, Article I, §28(d), California may no longer employ what this court noted in *Mapp v. Ohio, supra*, is the only effective deterrent to violations of citizens' reasonable expectation of privacy.

It is respectfully submitted that no state, consistent with Federal Due Process, may recognize a zone of privacy as a function of its State Constitution, and deny the only effective deterrent to its violation.

This Court in the past has recognized that the Due Process Clause protects rights or liberty interests that have their origin in state law. (*Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Hewitt v. Helms*, 459 U.S. 460, 466 (1983).) And this protection is not limited to questions of mere pre-deprivation procedures. As noted in Justice Blackmun's concurring opinion in *Parratt v. Taylor*, 451 U.S. 527, 545 (1981):

I also do not understand the Court to intimate that the sole content of the Due Process Clause is procedural regularity. I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protections, are, in and of themselves, antithetical to fundamental notions of due process. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971); *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973).

For a state to define a zone of privacy, and to thereafter deny the only effective procedural deterrent to its deliberate violation by state agents, is to grant a right and provide no effective procedural protection of the right whatsoever. A right of privacy guaranteed by state law is a fundamental liberty interest which

deserves the protection of the Due Process Clause. To hold otherwise is to allow a state to recognize a right of privacy, but to fail to deter the state's own agents from deliberately violating that right, and to use the fruits of that violation to convict a man of crime, and to deprive him of his liberty. Such is a governmental action fundamentally antithetical to notions of due process.

Nor do this Court's holdings in *New Jersey v. T.L.O.*, 469 U.S. 325, 344, fn. 10 (1985), *Cooper v. California*, 386 U.S. 58, 61 (1967), or *Rakas v. Illinois*, 439 U.S. 128, 143 fn. 12 (1978), dictate a contrary result. None of those cases squarely faced the issue presented herein.

Certainly decisions of this Court have recognized that the states may interpret their own constitutions as providing greater privacy rights than those recognized under the Federal Constitution. (*New Jersey v. T.L.O.*, *supra*, 469 U.S. at 344 fn. 10; *Cooper v. California*, *supra*, 386 U.S. at 61; see also, *Michigan v. Long*, 463 U.S. 1032 (1983).) In each of those cases, however, it was assumed that the state could, if it so desired, provide a remedy of exclusion of evidence if a zone of privacy recognized under state law was violated. None of those cases had occasion to pass on the validity, as a matter of federal due process, of a state granting a right and *entirely* withholding the only effective deterrent to its violation, thus allowing the state's own agents carte blanche to violate the right of privacy guaranteed under state law.

It is true, that in *Cooper v. California*, *supra*, this Court observed, in *obiter dicta*, that no federal question would be posed in the state's choice of a harmless error

rule applicable to the erroneous introduction of evidence under state law. The question was not squarely presented in *Cooper*. In that case, the state had held a search unlawful. This Court held the search lawful under Fourth Amendment standards. In *dicta*, this court noted that *if* the State held the search unlawful under state standards, no federal question would be posed. The due process issue raised herein was not ripe in *Cooper*. In any event, this Court assumed the imposition of a state exclusionary rule in *Cooper* (see *People v. Cahan*, 44 Cal.2d 434 (1955)), and had no occasion to pass on the questions herein presented.

Moreover, at oral argument, in response to a question, Respondent noted that due process is violated where the state fails to employ the exclusionary rule for violations of a fundamental zone of privacy. Whatever may be the resolution of that issue as to rules defining the scope of who may assert a violation of state law (see, *Rakas v. Illinois*, *supra*), or the rule to be employed in determining the impact on a trial of the erroneous introduction of evidence seized in violation of the state constitution (see *Cooper v. California*, *supra*), where, as here, the state recognizes a basic zone of privacy, due process must be viewed as precluding the complete deprivation of the only effective procedural protection of that zone of privacy.

Neither due process nor this Court should allow, encourage or condone deliberate violations of state law by state agents relating to recognized basic zones of privacy. (See, *United States v. Rickus* 737 F.2d 360 (3rd Cir. 1984); *United States v. Henderson* 721 F.2d 662 (9th Cir. 1983) (*dicta*); *United States v. Jarabek* 726 F.2d 889, 900 fn. 10 (1st Cir. 1984).

## CONCLUSION

It is respectfully submitted that a substantial federal question is posed in Respondent Greenwood's due process argument, and procedural bar should not be utilized to deny resolution of the issue at this time.

Dated: February 10, 1988

Respectfully submitted,

/s/ MICHAEL IAN GAREY  
*Attorney for Respondent  
Billy Greenwood*